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WHAT CONSTITUTES A "CONDITION OF PEONAGE" REPUGNANT TO THE FEDERAL CONSTITUTION AND STATUTES PASSED IN PURSUANCE THEREOF.

One of the most important legal questions before the country at the present time is that stated in the subject of this editorial. Peonage, as a system of Spanish jurisprudence and custom, may be, indeed, a subject of merely academic interest, but peonage in the sense of involuntary servitude under and by virtue of voluntary contracts or enforced by certain statutes now in force in several states relating to the enforced service of farm laborers, is a matter of lively concern not only to the business interests of those states having such laws, but to every citizen in the country, who must look with great concern and disapproval upon any attempted evasion of that amendment to the constitution which forbids involuntary servitude except upon due conviction for crime.

Peonage, in its historical sense, is an institution which had its origin in Spain and spread into all Spanish colonies, including Mexico, from whom we inherited it when we took in'o our union the territory of New Mexico. Peonage was not slavery, as it formerly existed in this country. The peon was not a slave. He was a freeman, with political as well as civil rights. He entered into the relation from choice, for a definite period, as the result of mutual contract. The relation was not confined to any race. The child of the peon did not become a peon, and the father could not contract away the services of his minor child, except in rare cases. The peon, male or female, agreed with the master upon the nature of the service, the length of its duration and compensation. The peon then became bound to the master "for an indebtedness founded upon an advancement in consideration of service." In the earlier stages of the institution there, the person agreeing to perform service could put an end to the relation by paying whatever he owed to the employer, at any time. If the peon wished to change masters or service, he could find a new employer who would advance enough to pay the peon's debts to his then master, and the peon would then become bound in the new employer's service. So also the master could sell the services of the peon, for the term, to any one who would pay his debts and assume the duties and obligations of the master.

In New Mexico, where this system flourished in all its glory, the powers of justices of the peace, who succeeded to most of the jurisdiction of the alcaldes in the administration of the law, were not clearly defined, and left very much to their discretion as to the return of persons to service, and the mode and quantum of judicial power which could be exercised to compel the service. There was often "unscrupulous disregard" as to "the legal rights of the unfortunate, the peon, and the feeble, when contesting with the wealthy and influential." The improvidence and the needs of laborers and servants, the greed of employers, and the exercise, often corrupt, of almost irresponsible power of local magistrates, resulted in citizens becoming bound, in constantly increasing numbers and length of service, to "compulsory service or labor" to coerce payment of debt or compel the performance of real or pretended obligations of personal service. The evils of the system not only degraded those who were subjected to the system, but exercised a baleful influence upon all other classes, which in innumerable ways fought against the industrial prosperity and moral advancement of the people among whom the "system" was enforced. It was also wholly out of keeping with the spirit of the amendment to the constitution, which forbids involuntary servitude, except upon due conviction of crime. Congress, therefore, determined not only to destroy the system as it existed in New Mexico, but to prevent in the future in that territory, or "in any other territory or state" of the union, the reappearance or re-establishment of the evil conditions which the system created. Accordingly, by the act approved on the 2d day of March, 1867, now embraced in sections 1990 and 5526 of the Revised Statutes of the United States, it was enacted:

"Sec. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or any other territory or state of the United States; and all acts and laws, resolutions, orders, regulations or usages of the territory of Mew Mexico, or in any other territory or state, which

have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"Sec. 5526. Every person who holds, arrests, returns or causes to be held, arrested or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or both."

Probably the most important judicial construction of this statute is to be found in the clear and exhaustive opinion of the United States District Court in the recent trials known as the Peonage Cases, 123 Fed. Rep. 671. These cases arose in Alabama and involved, incidentally, the statute in force in that and other states, making it a penal offense where a person, who has "contracted in writing to labor for or serve another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with the party furnishing lands, or the lands and teams to cultivate it, either to furnish the labor, or the labor and teams, to cultivate the lands," afterwards, without the consent of the other party, and without sufficient excuse, to be adjudged by the court, "shall leave such other party or abandon said contract, or leave or abandon the leased premises or land as aforesaid," and take employment of a similar nature from another person, without first giving him notice of the prior contract. This statute was passed, among other reasons, to remedy the great evils resulting from the abandonment of farms by laborers and renters, without justifiable excuse, after obtaining advances and incurring indebtedness to the employer, sometimes leaving the crops when it is almost impossible to secure other labor to save them. But Jones, J., in holding such legislation unconstitutional, says in part: "The great, general and essential principles of government can not be bent or swayed to the prejudice of renters or laborers, who are freemen and citizens, in order to improve the efficiency of our system of labor, or to avert the disastrous consequences to landlords and farmers which result in every other business in life when the obligations of contracts are not performed or respected. The gap once made by discrimination against laborers and renters, no other class of men would be safe from like discrimination. All other classes of society, alike with landlords and persons engaged in agricultural pursuits, are subject to losses and damages from the unreliability and dishonesty of debtors and employees who fail to perform contracts; but in all free governments the good sense of mankind, since the days when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties."

But peonage, in the sense in which it is used in the federal statute, may exist independent of such statute. In its broadest sense, peonage is the exercise of dominion over the persons and liberties of another by a master, or employer, or creditor, to compel the discharge of the obligation, by service or labor, against the will of the person performing the service. The condition of peonage, therefore, to which it is forbidden to hold or return any person, by the express words of the statute, means the situation or status in in which a person is placed, including the physical and moral results of returning or holding such person to perform labor or service, by force either of law or custom, or by force of lawless acts of individuals unsupported by local law, "in liquidation of any debt, obligation or otherwise." The phrase "condition of peonage" means the actual status, physical and moral, with the inevitable incidents to which the employee, servant or debtor was reduced under that system, when held to involuntary performance or liquidation of his obligation—the effect thereby produced upon the person, liberties and rights of a man in such a situation. Therefore, a person who hires another and induces him to sign a contract by which he agrees during the term to be imprisoned or kept under guard, and under cover of such agreement afterwards holds the party to the performance of the contract by threats or punishment, or undue influence, subduing his free will, when he desires to abandon the service, is guilty of holding such a person to "a condition of peonage." So, also, a person who falsely pre-

tends to another that he is accused of crime and promises to secure the dismissal of proceedings against him if he will serve him and who afterwards attempt to hold such party to his agreement by threats of punishment and exposure. So, also, where there is an agreement between a magistrate and a great landowner, which agreements are not uncommon in some localities, whereby a person is brought before the magistrate and the latter induces him to believe he is being prosecuted and that he has been sentenced to hard labor, and that another (the landowner) has paid his fine, and he is thereby induced to enter into a contract for his services to such landowner, the persons so concerned, both magistrate and landowner, are guilty of causing the accused to be held in a "condition of peonage." Of course, a magistrate, in a case of this kind, is not responsible, unless his action is intentional. On this point the court, in the principal case, says: "Where a magistrate or other judicial officer corruptly exercises his functions in order that a citizen may be convicted unlawfully and sentenced, so that a particular person, with whom he has an understanding, express or implied, by becoming the surety on confession of judgment, may get the custody of the convict, or make a profit out of a contract to be made between the convict and his surety, in consequence of which the convict is detained and put to hard labor, such magistrate or other judicial officer can not escape criminal responsibility to the United States for the conspiracy, and its natural and designed result, in the holding of a citizen in a condition of peonage or involuntary servitude, because the judicial officer has taken the precaution to veil his wrong in the form of an official act."

It will be observed that the foregoing is a most radical construction of an act of Congress to which little attention has been paid heretofore, and which has been generally supposed to relate only to the abolishment of the system of peonage as it existed in New Mexico. It seems from the argument of the court that this act has no such limitations and will apply to any condition brought about, either by law or by order of court, or by individual action, whereby one is induced to enter into an irrevocable contract for his services or by which he is not permitted to contract elsewhere. This is held to constitute a condition of peonage. It is hard, indeed, for the alert judicial mind to conceive the limit of the extensive ramifications of this construction into the various contracts and conditions imposed on persons in certain employments and under various circumstances. The final outcome of these cases, therefore, and the discussion which they must necessarily provoke will be awaited with interest.

NOTES OF IMPORTANT DECISIONS.

IS IT COMPETENT TO PROVE BY EXPERT TESTIMONY THAT A WOMAN IS PAST CHILD-BEARING?—Whether a woman is capable of bearing children at a given time in life or under certain circumstances is alleged by medical experts to be a matter of accurate determination. Nevertheless, the courts have been unwilling in most cases, on various grounds, to recognize the competency of expert or any other testimony on that question. In the recent case of Ricards v. Safe Deposit and Trust Co., 55 Atl. Rep. 384, the Maryland court of appeals considers the question quite thoroughly. In that case a trust was created for the benefit of the settlor and his wife for their joint lives, with a provision that, if said settlor should die, leaving his wife and a child or children surviving him, the property should be distributed to the widow and the child or children as if said settlor had died intestate and owning the property, and that, if said settlor should survive his wife and die, leaving children, the trust should be discharged, and the children take absolutely. Subsequently, the settlor and his wife joined in a bill to have the trust set aside, th ere being no children. The court held, tha expert evidence was inadmissible to prove that it was impossible for the wife to bear children.

The question here is not whether there is a presumption arising from age as to the impossibility of child-birth, but whether under any circumstances expert testimony may be entered to prove from actual scientific observation that a woman has not the capacity to bear children. In this particular case, physical conditions of the woman had been testified to by medical witnesses who volunteered to express an opinion that there was no possibility of the life teannt being the mother of children. In rejecting this evidence the court said: "Can of justice such evidnce be receeived in a court to effect the devolution of property, or to divert the course marked out for it to follow? The admission of such evidence in a case like this, where the avowed purpose of the proceeding is to cut out or strike down an estate in remainder, would or might be productive of most disastrous results. If because of physical degeneracy, atrophy, or decay, a medical man may, in a controversy involving title to an estate, testify that a woman is incapable of bearing

children, so that a trust deliberately created for her benefit during her life only may be brought to an end, with a view of vesting an absolute interest in her, or so that the vesting of a remainder may be accelerated, no one can foretell to what lengths such a precedent would lead. A surgical operation extirpating the uterus, for instance, would make it absolutely certain that no issue could be borne. If proof like that now under consideration were admitted, upon what principle could evidence showing that an operation of the kind indicated had been performed be excluded? And, if not excluded, what would prevent interested parties from resorting to such or similar operations, if by a resort to them a mere equitable life estate could be converted into an absolute interest? It is wholly immaterial whether the inability to bear children arises from natural or from artificial causes. It is not the cause, but the fact, that alone controls the question, and the single fact to which the law looks is death. Upon a case of first impressions, as this case is, we are bound to examine and weigh the results that may lie beyond the narrow horizon of an isolated controversy, and to consider the moral aspects of the situation, in reaching a conclusion which, when reached, may be fraught with such dangerous and demoralizing consequences. It is obviously not the province of courts of justice, and especially courts of equity, to encourage in any way a resort to a method like this for defeating a settlement or terminating a trust. If the evidence set out in the record should be received, no line could be drawn restricting or marking its limits, and no satisfactory reason could be given for the exclusion of the other species to which we have alluded; and, if the latter sort of evidence be admitted, a court of conscience would be made the instrument for the promotion or encouragement of acts most manifestly subversive of good morals. Even had the question as to the admissibility of this kind of testimony been decided in other jurisdictions adversely to the view we take, we should feel constrained, upon grounds of a sound public policy, to exclude the testimony in a contention like this.

There are some early English cases which upheld or sanctioned a presumption that a woman of a certain age was incapable of bearing children. The more modern English cases have not adopted or relied on this presumption. *In re* Dawson, L. R. 39 Chan. Div. 155; *In re* Sayer's Trusts, L. R. 6 Eq. 319. In Lawson on Presumptive Evidence, p. 302, it is said: "In a number of cases the English courts have acted on the presumption that a woman beyond a certain age is incapable of child-bearing. No case can be found in the American courts in which such a presumption has been given effect to."

STATUTORY RESTRAINTS ON THE MARRIAGE OF DIVORCED PERSONS.

One of the consequences of a dissolution of the marital tie, in the absence of statutory provisions to the contrary, is the liberty given both the parties to marry again. The power of the state to prohibit certain persons from marrying is undoubted, and laws forbidding the marriage of lunatics, idiots, persons under a certain age, and persons within certain degrees of relationship, are familiar examples of such exercise of the legislative power.

In many of our states laws have also been enacted, restraining, to a greater or less degree, the marriage of a divorced person. The constitutionality of such enactments has been uniformly declared by the courts.[1] These legislative impediments and some of the numerous questions to which they have given birth, will be considered in this article. The nature, extent, duration and effect of these restrictions vary in the several states and territories, and as they are purely statutory and subject to change, the wise and careful practitioner will always familiarize himself with the statutes which control the particular case before formulating his opinion or giving his advice. The restriction may be declared by statute or it may be decreed by a court under authority conferred by statute.[2]

The following states and territories now impose no restriction whatever upon the subsequent marriage of either party to an action for divorce, viz: Arkansas, District of Columbia, Marlyand, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, Idaho, Illinois, Indiana, Indian Territory, Iowa, Ohio, Rhode Island, Utah, West Virginia and Wyoming. The statutes of Arizona, Connecticut, Kentucky, North Carolina, Pennsylvania and Texas, expressly provide that either party may marry again at any time after divorce is granted. South Carolina alone, of all the states, has no divorce laws. Alabama, Mississippi and Virginia confine the imposition of the restriction to the discretion of the court granting the divorce, while in Georgia

[1] Musick v. Musick, 88 Va. 12; Owen v. Bracket, 75 Tenn. 448; Elliott v. Elliott, 38 Md. 357; Eaton v. Eaton (Neb.), 92 N. W. Rep. 995.

[2] Musick v. Musick, 88 Va. 12.

the matter is determined by a court and jury by whom the application for the divorce is heard. In Alaska, Colorado, California, Minnesota, Montana, Oklahoma, Oregon, Maine, Kansas, North Dakota, Washington and Wisconsin, the restrictions apply to both parties; but in Delaware, Massachusetts, Michigan, Nebraska, New York, Louisiana, South Dakota, Tennessee, and Vermont, they apply to but one of the parties. The Nebraska law is peculiar in that the restriction is confined to the one in whose favor the decree of divorce is made while in the other states last named it applies to the defendant, or person against whom decree is made. The divorce statutes of Florida contain nothing on the subject but sections 2603–4 of the criminal code appear to make it bigamy for the guilty party to marry again while the former husband or wife is alive.

In some states the restriction seems to have been imposed with a view to the infliction of punishment upon the guilty party for violation of the marital obligations, as in Alabama, Delaware, Florida, Georgia, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New York, South Dakota, Tennessee, Vermont and Virginia, while other states seem to impose it as a means of preserving the *status quo* of the parties until appellate proceedings can be begun and terminated, as Alaska, Colorado, California, Kansas, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Washington and Wisconsin. Montana seems to impose the restraint for both purposes. In Delaware, Tennessee, Louisiana, Mississippi, New York, South Dakota, and Virginia, the law applies to cases where divorce is granted on the ground of adultery, and in the first three states it is confined to marriage with the accomplice in adultery. The statute of Louisiana is peculiar in that one section provides that the wife shall not be at liberty to contract another marriage until ten months after the dissolution of her preceding marriage; while another section provides that in case of a divorce on the ground of adultery, the guilty party can never contract marriage with the accomplice in the crime. No other restriction is imposed in this state. The restriction against marriage with the accomplice is terminated in Tennessee by the death of the former husband or wife. In New York and South Dakota the restriction for adultery is general and ends with the life of the innocent party, though in New York it may be removed after five years by the court which granted the divorce on proper application and proof that since the divorce the conduct of the applicant has been uniformly good. In some other of the states provision is made for removing the restriction, as in Maine, where the court granting the divorce may remove the restriction from defendant; and Alabama, where the chancellor is permitted, upon petition and proper proof to allow or disallow the petition to marry again as justice may require. In Georgia it may be removed by application to the court, and trial by jury, as in case of divorce. In Virginia, for good cause shown, the court which pronounced the decree may at any time remove the disability.

Several states, expressly or by implication, allow the remarriage of the divorced couple, as Alaska, California, Colorado, Kansas, Montana, Oklahoma, Oregon, South Dakota, Vermont and Washington.

In the absence of statutory authority, express or implied, remarriage of the divorced couple, with each other, comes within the law.[3]

A later New York case treats the question as undetermined in that state, saying: "Whether the innocent party, who has the right to marry again, can resume the marriage relation with the husband from whom she was divorced, who is prohibited from marrying again, and such marriage be legal and valid, presents a serious question which has not been decided in the courts of this state." Colvin v. Colvin is said to be *dictum*, and "the point, therefore, remains undetermined and open for consideration when it shall properly arise."[4]

Some text writers make the statement that such remarriages are not in violation of the prohibition, but the cases they cite either do not support the statement or announce the opposite rule. But whatever view he may take of the legality of such marriage, the cautious lawyer will always take precautions to avoid raising the question, either by an ap-

[3] Moore v. Moore, 8 Abb. N. C. 171; Colvin v. Colvin, 2 Paige, 385; Atlanta v. Anderson, 90 Ga. 482.

[4] Moore v. Hegeman, 92 N. Y. 521.

plication to the court for permission to remarrying or for vacation of the decree of divorce, or by some other appropriate method of procedure.

Where the restriction is imposed to preserve the *status quo* of the parties, the incapacity sometimes terminates at the conclusion of appellate proceedings, or if no appeal be taken, at the expiration of the period within which such proceedings could be commenced, as in Alaska, Nebraska, Oregon and Washington. In others, at the end of a definite period, as in California and Colorado, one year; the Supreme Court of Colorado in Branch v. Branch, 71 Pac. Rep. 632, in construing the statute of that state holds that an appeal suspends the judgment for all purposes, and that the appellee cannot lawfully marry again during the pendency of the appeal, and, further, that the supreme court has the right, in divorce proceedings, to take notice of the change of status of the parties or either of them, and that, when one of the parties remarries, pending an appeal, that party has not the right either to prosecute or defend the appeal and cannot be heard to question the correctness of the decision of the court in a petition for a rehearing; Louisiana, ten months for the wife; in Maine, not within two years after the decree becomes absolute for plaintiff, unless with permission of the court, and after two years by permission of the court for defendant; in Massachusetts the party against whom the decree is made cannot marry again within two years after decree has become absolute. In both Maine and Massachusetts, the decree in the first instance is a decree *nisi*, and cannot become absolute until six months from the date thereof; in the former state by entry of the clerk of the court, on application of either party, unless the court has otherwise ordered; and in the latter state, apparently without further action, unless the court, before the expiration of the time, has otherwise ordered. In Michigan the duration of the restriction must be set out in the decree and shall not exceed two years from the time the decree was entered. In Minnesota, the time is six months; in Montana, two years for the innocent party and three years for the guilty one; in North Dakota it is three months; in Kansas and Oklahoma, six months from date of decree, and if appeal is taken, not until the expiration of thirty days from the date of final judgment in supreme court on such appeal; in Vermont the libelee cannot marry within three years unless the libellant has died in the meantime; in Wisconsin, one year from the date of decree, except by permission of the court which granted the decree.

The language to express the restraint is not at all uniform, as in Alaska, Oregon and Washington, "except that neither party shall be capable;" Colorado, "neither party shall be permitted;" Kansas, Minnesota, Nebraska and Oklahoma, "it shall be unlawful;" Louisiana, "shall not be at liberty" and "can never contract;" Maine, Massachusetts, Michigan, Mississippiand Virginia, "shall not not marry again;" Montana "cannot marry again;" New York, "no defendant * * * shall marry again;" North Dakota, "neither * * * may marry again;" South Dakota, "cannot marry any person, except;" Tennessee, "shall not marry;" Vermont and Wisconsin, "it shall not be lawful." The language used to define the offense involved in a violation of the restriction and to declare the *status* of such a marriage is also far from harmonious, as, in Alaska and Oregon, the offender "shall be liable as if such divorce had not been entered;" in Kansas and Oklahoma, the offender "shall be deemed guilty of bigamy and the marriage is absolutely void." A second section of the Kansas and Oklahoma, laws now provides that every decree must give the day and date when the judgment was entered, and state that the decree does not become absolute until the expiration of six months from said time. This section, it is held, gives the decree the effect of a decree *nisi*.[5] In Louisiana the language used to define the offense is "under penalty of being considered and prosecuted as guilty of the crime of bigamy," and "under penalty of nullity of the new marriage;" in Michigan, "is deemed to have committed the crime of bigamy;" in Minnesota, the offense is perjury in making a false statement regarding divorce in the application for a marriage license; in Mississippi, "in which case such party shall remain in law as an unmarried person;" in Nebraska, is subject "to all the penalties of

[5] Blush v. State (Kan.), 46 Pac. Rep. 185; Niece v. Territory (Okla.), 60 Pac. Rep. 300.

other cases of bigamy;" in Virginia, "in which case the bond of matrimony shall be deemed not to be dissolved as to any future marriage of such party, or on any prosecution on account thereof;" in Washington, marriage within or without the state is void and party is guilty of contempt of court; in Wisconsin, "shall be null and void." In devising a "punishment to fit the crime," the lawmakers exhibit the same diversity of opinion as to the gravity of the offense, the penalty ranging from a small fine to imprisonment in jail or penitentiary.

Statutes restricting the marriage of divorced persons may be regarded as in derogation of a natural right of mankind and should, for that reason, be strictly construed and given effect only to the extent required by their direct and express terms.[6]

The restraint, it has been held, applies only to divorces granted in the state, imposing such restraint.[7] The contrary rule has been held in New York where dower was denied on a showing that the deceased husband, while a resident of Massachusetts, had been divorced from his wife for his fault and later had removed to New York and married the plaintiff while his former wife was still living. It was held that the New York statutes governed whether the divorce was granted in that state or not, so long as the marriage was celebrated in New York.[8] The restriction may be applied, though the law authorizing its imposition may have been passed and taken effect after the commission of the offense (adultery) for which it is imposed.[9] But the restriction cannot be imposed by the court without authority of a statute.[10] Nor can it be applied where the party against whom it is made is a non-resident of the state and makes no appearance in the action.[11]

The decisions are not in harmony as to the *status* of a marriage in violation of the prohibition, celebrated within the state where the divorce was granted and where the statute does not, in express words, declare such marriage void. Some courts hold to the opinion that the offender is subject to a criminal prosecution, but that the marriage must be regarded as valid,[12] and that punishment can be inflicted upon those who enter the marriage relation in disregard of the statutory requirements, without rendering the marriage void.[13] Other courts hold such a marriage to be absolutely void;[14] while still others hold that the marriage is merely voidable, and if not pronounced void in the lifetime of the parties is valid for all civil purposes.[15] Conn v. Conn,[16] was governed by the Kansas law of 1881, which merely declared the marriage to be unlawful and provided that the decree should be final unless notice of an intention to appeal was given in open court within three days from date of decree. In 1889 the law was changed to its present form. Nor are the authorities agreed as to the *status* of the marriage contract of one under a divorce prohibition, when celebrated in a state other than the one in which the divorce was decreed.

Some courts hold that such marriages come within the general rule that a marriage valid by the law of the place where it is contracted or celebrated is valid everywhere, and state the rule about as follows: A marriage which is prohibited in one state by statute, is yet valid if celebrated elsewhere, according to the law of the place, even if the parties, being citizens and residents of the former state have gone into the other state for the purpose of evading the law, unless the legislature has clearly enacted that such marriage out of the state shall have no validity at home.[17] Other

[6] Crawford v. State, 73 Miss. 172.

[7] Bullock v. Bullock, 122 Mass. 3; Clark v. Clark, 8 Cush. (Mass.) 385; Succession of Hernandez, 46 La. Ann. 962, 15 So. Rep. 461.

[8] Smith v. Woodworth, 44 Barb. (N. Y.) 198.

[9] Elliott v. Elliott, 38 Md. 357.

[10] Barber v. Barber, 16 Cal. 378.

[11] Garner v. Garner, 56 Md. 157.

[12] Crawford v. State, 73 Miss. 172.

[13] Conn v. Conn, 2 Kan. App. 419; State v. Walker, 36 Kan. 307.

[14] Owen v. Bracket, 75 Tenn. 448; *In re* Borrowdale (N. Y.), 28 Hun, 336; Medway v. Needham, 16 Mass. 157; Ovitt v. Smith, 68 Vt. 35; Googins v. Googins, 152 Mass. 533; Cropsey v. Ogden, 11 N. Y. 228; Eaton v. Eaton (Neb.), 92 N. W. Rep. 995.

[15] Park v. Barron, 20 Ga. 702; Mason v. Mason, 101 Ind. 25; Stevenson v. Gray, 17 B. Mon. (Ky.) 193.

[16] 2 Kan. App. 419.

[17] Com. v. Lane, 113 Mass. 458; Medway v. Needham, 16 Mass. 157; West Cambridge v. Lexington, 1 Pick. 506; Putnam v. Putnam, 8 Pick. 433; *In re* Woods Estate (Cal.), 69 Pac. Rep. 900; Ross v. Ross, 129 Mass. 243; Bullock v. Bullock, 122 Mass. 3; Whiffin v. Whiffin, 171 Mass. 560; Thompson v. Thompson, 114 Mass. 566; State v. Richardson, 72 Vt. 49; Tyler v. Tyler, 170 Mass. 150; Succession of Hernandez, 46 La. Ann. 962; State v. Shattuck, 69 Vt. 403; Van Voorhis v. Brintnall, 86 N. Y. 18; Moore

courts hold that such marriages, even when the statute does not expressly declare them void, come within the exception to the general rule as "contrary to the law and public policy of the domicile," and they are therefore void.[18]

In New York, in an action for divorce, the court refused to recognize the fact that the marriage was contracted in another state, in order to evade the laws of New York, which prohibited the plaintiff from again marrying, as a ground for denial of the relief sought.[19] But the courts have sometimes taken the opposite view and refused relief.[20]

It is held that a woman divorced by decree of a New York court and prohibited from again marrying in that state, is yet capable of marrying in Pennsylvania, and may therefore maintain an action in the latter state for breach of promise of marriage.[21] But it would seem that such an action cannot be maintained even though the marriage is to be contracted in a state where the prohibition does not attach, if the parties intend to return to the state of promisor's domicile to reside, and propose to go into the other state to evade the law of domicile. The place where the parties are to be domiciled is the place of the performance of the marriage contract and the substantial consequences of the act to be performed are fixed by the law of the domicile.[22] When the guilty party marries again without leave of court, where the statute provides for such leave, and during the life of the other party, and afterwards obtains such leave, a continued cohabition in the belief that the marriage already solemnized is, or, has become, valid, does not render it valid. So held in a state where the common law marriage is not recognized.[23] A marriage solemnized before decree of divorce *nisi* is made absolute is void, and the innocent party is entitled to have it annulled, and the belief of the parties as to its validity is immaterial.[24] Under the Oregon and Washington statutes which apply to both parties to the divorce, the decree has been construed as a in the nature of a decree *nisi* which does not become absolute until the expiration of the time within which appellate proceedings might be had or until such proceedings have been concluded and a marriage either within or without the state is held to be void.[25] And a continuance of cohabitation after the expiration of the time or removal of the impediment does not create a valid marriage.[26]

In these cases a distinction is made between a statutory prohibition and a declaration of incapacity to enter the marriage relation, and also between statutes which impose the restraint upon both parties and those which apply to the guilty party alone, leaving the innocent party perfectly free to marry again. The opinion in McLennan v. McLennan, in referring to Wilhite v. Wilhite, erroneously states that the marriage complained of in the latter case took place in Kansas, when as a matter of fact the divorce was obtained in Oregon and the marriage was celebrated at Baker City in the same state. But in Nebraska while the marriage, within the state, of one under this restraint, is illegal and void, it is held that the parties, may, after the impediment has been removed, become lawfully united by continuing to live together with the intention of sustaining toward each other the relation of husband and wife. And even where the existence of the impediment and its removal were unknown, continued cohabitation evidences consent to live in wedlock.[27] The supreme court of Tennessee in construing the statute of Washington declared that it did not make the marriage void but simply subjected the offender to punishment for contempt of court, and further declared that the law had no extra-territorial effect and that a marriage in Tennessee of one who had been divorced in Washington within the previous six months was valid.[28]

v. Hegeman, 92 N. Y. 521; Thorp v. Thorp, 90 N. Y. 602; Phelps v. Gregg, 10 Watts. (Pa.) 158; Fuller v. Fuller, 40 Ala. 301; Wilson v. Holt, 83 Ala. 528; Sutton v. Warren, 10 Met. 451; Com. v. Hunt, 4 Cush. 49.

[18] Pennegar v. State, 87 Tenn. 244; Newman v. Kimbrough (Tenn.), 59 S. W Rep. 1059; State v. Tutty, 41 Fed. Rep. 753; Williams v. Oates (N. Car.), 5 Ire. 535; State v. Kennedy, 76 N. Car. 251; State v. Ross, 76 N. Car. 242; Kinney v. Com., 30 Gratt. (Va.) 858.

[19] Thorp v. Thorp, 90 N. Y. 602.

[20] Adams v. Adams, 2 Chester Co. Rep. (Pa.) 560; Kerrison v. Kerrison, 8 Abb. N. C. (N. Y.) 444.

[21] Van Storch v. Griffin, 71 Pa. St. 240.

[22] Campbell v. Crampton, 2 Fed. Rep. 417; Haviland v. Halstead, 34 N. Y. 643.

[23] Thompson v. Thompson, 114 Mass. 566.

[24] Cook v. Cook, 144 Mass. 163.

[25] Wilhite v. Wilhite, 41 Kan. 154; McLennan v. McLennan, 31 Oreg. 480.

[26] *In re* Smith's Estate (Wash.), 30 Pac. Rep. 1059.

[27] Eaton v. Eaton (Neb.), 92 N. W. Rep. 995.

[28] Turpin v. Turpin (Tenn.), 58 S. W. Rep. 763.

It is within the power of the legislature of a state to enact that marriages of its citizens who have gone into another state for the purpose of evading its laws and with the intention of returning to reside therein shall have no validity at home.[29] But it is held that both parties to the marriage must be residents and domiciled in the state, both know of the previous marriage and divorce and both go out of the state to evade the law and with the intention of immediately returning to the state of the domicile to reside.[30] In Virginia, however, such a marriage is held to be void, even though no statute makes it so.[31] By accomplice in the crime of adultery is meant the person named in the pleadings and decree as the one with whom the guilty party has consorted and unless the name is so set forth the restriction cannot be enforced.[32] A marriage outside the state where divorce was obtained will not subject the offender to criminal punishment in that state.[33]

In prosecutions for violations of these statutes, care should be exercised, in drawing the indictment or complaint, to follow the special statutory provision and to accurately and clearly allege all the ingredients of which the offense is composed.[34] Statutes in restraint of the marriage of divorced persons give rise to very many difficult questions and violations thereof have caused much grief and suffering to innocent parties thereto and to the issue of such marriages. They have placed the stain of illegitimacy upon children; have deprived an innocent woman of the sacred and honored name of wife and of the right of dower; have given a guilty and faithless woman dower in the estate of the man from whom she had long been separated by a decree of divorce of her own seeking; have prevented a divorce when one was justly due; have affected the right of admistration and changed the division of estates; have affected actions for support and maintenance, for breach of promise to marry, for bastardy, for the wrongful death of another, for possession of property, for support of paupers, for partition of real property and in many other ways influenced the affairs of life.

As to the wisdom of these statutes the writer will venture upon no discussion further than to state that in his opinion all such laws intended to serve any purpose other than that of giving the defeated party the right of appeal or right to a hearing, are wrong in principle, are instruments of injustice, futile in effect and where they exist should be repealed.

H. J. WHITMORE.

Lincoln, Neb.

[29] State v. Shattuck, 69 Vt. 403; Van Voorhis v. v. Brintnall, 86 N. Y. 18.

[30] Com. v. Lane, 113 Mass. 458; Tyler v. Tyler, 170 Mass. 150; State v. Ross, 76 N. Car. 242; Williams v. Oates (N. Car.), 5 Ire. 535.

[31] Kinney v. Com., 30 Gratt. 858.

[32] Succession of Hernandez, 46 La. Ann. 962.

[33] State v. Shattuck, 69 Vt. 403.

[34] Niece v. Territory (Okla.), 60 Pac. Rep. 300; Com. v. Lane, 113 Mass. 458; Com. v. Richardson, 126 Mass. People v. Faber, 92 N. Y. 146; Com. v. Putnam, [illegible]. 136.

BOUNDARIES — PAROL AGREEMENT FOLLOWED BY POSSESSION.

FARR v. WOOLFOLK.

Supreme Court of Georgia, July 1, 1903.

1. Under Civ. Code, § 3247, acquiescence for seven years by acts or declarations of adjoining landowners will establish a dividing line.

2. Independently of the rule laid down in the Code section, a parol agreement between coterminous proprietors that a certain line is the true dividing line is valid and binding as between them, if the agreement is accompanied by possession of the agreed line or is otherwise duly executed, and if the boundary line between the two tracts is indefinite, unascertained, or disputed. Such an agreement is not within the statute of frauds, because it does not operate as a conveyance, but merely as an agreement with respect to what has already been conveyed.

Syllabus by the court.

FISH, J. Woolfolk brought his action against Farr to recover the possession of a strip of land eight chains in width and 45 chains in length, and to enjoin the defendant from cutting timber thereon. The trial resulted in a verdict and decree in favor of the plaintiff, and the defendant excepts to the refusal of the court to grant him a new trial.

It is conceded that the plaintiff is the owner of lot 112, and that the defendant is the owner of lot 111, in the Seventh District of Chattahoochee county. The issue is as to the dividing line between the two lots. The plaintiff contends that lot 112 is a lot of the ordinary size in the land survey of that portion of the state; that is, a lot 45 chains square, containing 202 1-2 acres. The defendant admits that the ordinary lot in that portion of the state would be of the character just indicated, but contends that, by a mistake of the surveyors or otherwise, the two lots involved in the present controversy were not laid off in equal size; that 111 is a parallelogram, 45 chains on two sides and 53 chains on the other two; and that lot 112 is 45 chains on two sides and 37 chains on two. He also contends that, even if the original land lines would not make lot 111 of the size

just indicated, the owners of the two lots have acquiesced in a boundary line different from what the line would have been under a regular survey, and that, treating this agreed line as the true line, the lots would be of the sizes above indicated. The lots in this part of the state were intended to be laid off in lots 45 chains square, containing 202 1-2 acres. See, in this connection, the very able paper of Mr. Alex C. King, of the Atlanta bar, in the Georgia Bar Association Reports of 1885 [page 157]. Whether the survey was actually made in accordance with this plan was, of course, a question of fact to be determined by the evidence in the case. If this was not true, the question as to whether a line between the two lots had been agreed on by the coterminous owners was also, a question of fact.

Error is assigned upon the following charge of the court: "If you should believe now that there was a recognized line between Mr. Farr and Mr. Woolfolk, although the same may not have been the true line, if it was the recognized line between them, there was an agreement between Farr and Woolfolk that the line was at a certain place, and Farr was in possession of it for more than seven years, he would have the title to it; otherwise he would not." This charge is alleged to be erroneous, because the law allows owners of land to agree upon a dividing line, and an agreement as to a dividing line is binding from the time it is made, and does not have to be acquiesced in for seven years. The Code provides, in distinct terms, that acquiescence for seven years by acts or declarations of adjoining landowners shall establish a dividing line. Civ. Code, § 3247. See, also, Cleveland v. Treadwell, 68 Ga. 835; Camp v. Cochrane, 71 Ga. 865; Boardman v. Scott, 102 Ga. 421, 30 S. E. Rep. 982, 51 L. R. A. 178; Glover v. Wright, 82 Ga. 117, 8 S. E. Rep. 452, and cases cited. These authorities establish that, where acquiescence as to a dividing line is relied on, such acquiescence must be shown to have been for a period of at least seven years. There is, however, another rule of law equally of force in Georgia, though not, in terms, referred to in the Code. This rule has been thus stated: "Where the boundary line between two estates is indefinite or unascertained, the owners may, by parol agreement, establish a division line, and the line thus defined will afterwards control their deeds, notwithstanding the statute of frauds." 4 Am. & Eng. Enc. L., 2d Ed., 860. See, also, 5 Cyc. 931. The following quotation from Tyler's Law of Boundaries, page 254, accurately and concisely states the reasons why an agreement of this kind is not within the statute of frauds: "Agreements made in respect to disputed boundary lines are not within the statute of frauds, because they cannot be considered as extending to the title; nor do they have the operation of a conveyance, so as to pass the title from one to another. The object is not to pass the estate, or to make a conveyance and transfer to one person of lands which belong to another; but such agreements proceed upon the fact that the true line of separation is not only fairly and truly in dispute, but that it is also, to some extent, undefined and unknown. They recognize and confirm the title of both the contracting parties to the land, of which they are respectively the real owners, and seek only to distinguish and place beyond the reach of future doubt the true line of separation between them." Under the Code, acquiescence in a dividing line for a period of seven years or more will operate to establish the line, without regard to any previous parol agreement between the parties as to the line; and a parol agreement as to the line, if of the character indicated by the foregoing quotations, is equally binding. Such an agreement does not depend for its validity upon acquiescence or estoppel. Lecomte v. Toudouze, 82 Tex. 208, 17 S. W. Rep. 1047, 27 Am. St. Rep. 870. Acquiescence for the period required by the statute would be conclusive evidence of a previous agreement, though there may in fact have been none; but an actual agreement in fact, whether in writing or parol, takes the place of acquiescence, and becomes binding from the time it is made. Lindsay v. Springer, 4 Har. 547, 550. The distinction just referred to is clearly pointed out in Gwynn v. Schwartz (W. Va.), 9 S. E. Rep. 880, 885. It is, however, indispensable that a parol agreement as to a dividing line be accompanied with possession or that something else should be done by the parties to execute the agreement. City of Natchez v. Vandervelde, 31 Miss. 706, 66 Am. Dec. 581; Sawyer v. Fellows, 6 N. H. 107, 25 Am. Dec. 452; Lindsay v. Springer, 4 Har. 547; Grim v. Murphy, 110 Ill. 271; Tate v. Foshee (Ind.), 20 N. E. Rep. 241; Glenn Mfg. Co. v. Lumber Co. 80 Fed. Rep. 242; Atchison v. Pease (Mo. Sup.), 10 S. W. Rep. 159; Ernsting v. Gleason (Mo. Sup.), 39 S. W. Rep. 70; Berghoefer v. Frazier (Ill.), 37 N. E. Rep. 914; Gwynn v. Schwartz (W. Va.), 9 S. E. Rep. 880, 885. Neither acquiescence in nor possession under the agreed line for any considerable length of time is necessary to give validity to the agreement, though it has been held that the agreement derives additional weight from long acquiescence. Nichol v. Lytle, 4 Yerg. 456, 26 Am. Dec. 240; Duff v. Cornett (Ky.), 62 S. W. Rep. 895.

There is no decision of this court which would prevent the application in this state of the rule respecting parol agreements as to dividing lines. Nearly all of the decisions of this court upon the subject of dividing lines relate to the rule laid down in the section of the code, but the decisions in Clark v. Hulsey, 54 Ga. 608, and Cleveland v. Treadwell, 68 Ga. 835 (3a), are authority for the proposition that a parol agreement as to a dividing line may itself be binding, when executed, independently of the rule laid down in the code concerning acquiescence for seven years. The decision made in Miller v. McGlaun, 63 Ga. 435, is also in entire harmony with what has been said above. While it was ruled in that case that the

parol agreement relied on was not binding, because not made to settle any dispute with respect to the true line, but to set up a totally different and independent line, with no occupancy of the part in dispute, the following language of Mr. Justice Jackson makes it clear that nothing said in that case conflicts with the ruling now made: "If there had been any dispute on the point where the true dividing line of the two lots ran, and by agreement of the coterminous owners thereof a line had been fixed on as such true line, whether the creek or any other, it cannot be doubted that the parties could do so by verbal agreement, and such agreed line would bind subsequent holders under either, and that proof thereof could be made in parol; but where there is no dispute, and never was any, in respect to the true line between the lots, and the deeds called for that line, and the defendant's written title covered the soil only up to the same line—not a line agreed upon by anybody, or in dispute as to location between any parties, but the original line between the lots—then we think that to convey land above or below such true original line, so as to bind purchasers without any notice, or any inclosure or cultivation thereof, would require written conveyance, under the statute of frauds."

It is apparent from the foregoing that the charge of the court was erroneous. The evident idea of the trial judge was that the rule laid down in the section of the code concerning acquiescence was the only rule on the subject of force in this state, and that, to give validity to a parol agreement, it was essential that it should have been acquiesced in for at least seven years. The error thus committed requires a new trial. While the jury found, under the evidence, that the parties had not for seven years or more acquiesced in the line claimed by the defendant, they had no opportunity, in view of the judge's charge, of passing upon the question whether there had been a valid parol agreement between the parties as to the line, independently of acquiescence for a long period of time. While the evidence as to the existence of such an agreement is meager, viewing it as a whole, the jury could have found that the plaintiff pointed out to the defendant the line claimed by him, and that he agreed with the plaintiff that this was the true line, and acted on the agreement thus made. While the evidence does not show a distinct agreement between the parties, the circumstances point to such an agreement with sufficient certainty to have authorized a finding in favor of the defendant on this theory. The weight of the evidence was probably with the plaintiff, but this is not the criterion for determining whether a new trial should have been granted.

Judgment reversed.

NOTE. — *Validity of Oral Agreements Fixing Boundary Lines.*—Most of the disputes that arise over boundary lines, arise either in the negligent manner in which the original survey is made, or in the carelessness of land owners in subdividing their property and permitting the erection of division fences without the services of a surveyor. Disputes as to boundaries arising from these causes, or any other cause, are often further complicated by oral agreements between the parties as to the true line. We shall here discuss the validity of these agreements.

What Constitutes an Agreement?—Sometimes, where no *express agreement*, either oral or in writing, is made as fixing a certain boundary line, an agreement is sought to be inferred from circumstances. Thus, if one of two owners of adjoining lots erect a fence on what he supposes to be the true line between the lots, and the other acquiesces for a considerable time in such location of the fence, this is evidence of an agreement. Eaton v. Rice, 8 N. H. 381; Jackson v. Ogden, 7 Johns. 238; Lecomte v. Tondonze, 82 Tex. 208, 17 S. W. Rep. 1047. But there must be evidence of an agreement to fix the boundary, not a mere license to erect a fence, even though such license is followed by possession. Dement v. Williams, 44 Tex. 158; Wright v. Lassiter, 71 Tex. 640.

Validity in General of Oral Agreement. — It will need no citation of authority to support the statement that oral agreements, fixing disputed boundaries, are not only perfectly proper and legal, but are especially encouraged by the courts as offering a happy and most perfect solution to what are otherwise most spiteful and vexatious controversies. See, Turner v. Baker, 64 Mo. 218, 27 Am. Rep. 226. Where a boundary is thus fixed by parol it is binding, not only on the original parties, but also upon their successors in title. Watrous v. Morrison, 33 Fla. 261, 14 So. Rep. 805, 39 Am. St. Rep. 139. Such an agreement is also enforceable in chancery. Threlkeld v. Winston, 2 Ky. Law Rep. 63; Jamison v. Petit, 69 Ky. 669.

Existence of Controversy or Dispute.—One of the most important requisites to validate a parol agreement for the determination of a certain boundary is the existence of a controversy or doubt as to where such boundary should be, as it is only where there is a doubt as to the identity of the dividing lines, that the parties may establish their lines by parol agreement. Boyd v. Graves, 4 Wheat. (U. S.) 513; Miller v. McGlann, 63 Ga. 435; Cutler v. Callison, 72 Ill. 113; Lewallen v. Overton 28 Tenn. 76; Hartung v. Witte, 59 Wis. 285, 18 N. W. Rep. 285. In California the rule is supposed to be otherwise. There it is held that where coterminous owners agree as to a division line between them, in which they acquiesce, and under which they occupy for a period equal to that fixed by the statute of limitations, the line thus established is binding upon them and their successors without reference to the existence of any dispute as to the true line. Helm v. Wilson, 76 Cal. 476; Silvarer v. Hansen, 77 Cal. 579, 20 Pac. Rep. 136. In the last case cited the court holds, however, that while no existing *dispute* is necessary, there must be some conflict, uncertainty or indefiniteness about the boundary such as "cannot be determined without judicial investigation." It is apparent therefore that the California authorities do not necessarily oppose the general rule already laid down. Thus in the case of Harn v. Smith, 79 Tex. 310, 15 S. W. Rep. 240, the same rule is practically declared where it is held that allegations that the true location of a certain lot was not well defined and known, and that various surveys had left it uncertain, were sufficient to sustain a parol agreement fixing the boundary line. So also in Levy v Maddox, 81 Tex. 210, 16 S. W. Rep. 877.

Acquiescence and Possession.—Another requisite to validate a parol agreement as to boundary is acquiescence by the parties followed by possession. Thus a mere parol agreement between adjoining owners, fixing a division line which is not the true one, is not binding, unless followed by acts on the faith thereof which would make it inequitable to disturb such line as thus fixed. Meyers v. Johnson, 15 Ind. 261; Robinson v. Corn, 5 Ky. 125; Smith v. Stewart, 7 Ky. Law Rep. 287. But where this agreement as to boundary is acquiesced in by the parties who also assume possession of their respective lands up to the division line thus established, the agreement is valid. Archer v. Helm, 69 Miss. 730; Jenkins v. Trager, 40 Fed. Rep. 726; Ferguson v. Crick (Ky. 1893), 23 S. W. Rep. 668; Tate v. Foshee, 117 Ind. 322, 20 N. E. Rep. 241; Turner v. Baker, 8 Mo. App. 583; Nichal v. Lytle, 12 Tenn. 456, 26 Am. Dec. 240; Atchison v. Pease, 96 Mo. 566; Gwynn v. Schwartz, 32 W. Va. 487; Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. Rep. 400, 19 L. R. A. 802. It is not necessary, however, that such an agreement should be acquiesced in for a long time. Cooper v. Austin, 58 Tex. 494.

Sufficient Title or Ownership.—Still another requisite to the validity of a parol agreement as to boundary is a proper title or a sufficient assertion of ownership, coupled with possession on the part of those making the agreement. Thus, a parol agreement respecting a boundary made while a party is only an occupant, without title, cannot be binding upon him after he acquires the fee. Crowell v. Mangles, 7 Ill. 419, 43 Am. Dec. 62; Wright v. Wright, 61 Tenn. 469. Nor is the agreement binding where the title of one of the parties is not a valid one. Lewallen v. Overton, 28 Tenn. 76. So, also, a lessee or remainderman have no authority to agree as to any boundary about the premises leased or held in remainder. Northern Pine Land Co. v. Bigelow, 84 Wis. 157, 54 N. W. Rep. 496; Doe v. Thompson, 5 Cow. (N. Y.) 371. But this rule does not imply that the title of the party shall be perfect. Thus, a party holding and claiming ownership of land, who has not paid the consideration therefor, has sufficient title or right of ownership to support an agreement of this nature. Cavanaugh v. Jackson, 91 Cal. 580, 27 Pac. Rep. 931. So, also, a settler upon public land. Jordan v. Deaton, 23 Ark. 704. So, also, possession, coupled with assertion of ownership under a contract of purchase, has been held sufficient. Silvarer v. Hansen, 77 Cal. 579, 20 Pac. Rep. 136. So, also, a mortgagor may bind all parties but the mortgagee and those claiming under him. Orr v. Hadley, 36 N. H. 575. So, also, legatees to the proceeds of the sale of certain real estate may make agreements as to boundary, so far as such agreement does not affect the rights of creditors of the estate.

The Statute of Frauds.—The fixing of a boundary line by parol is not within the operation of the statute of frauds. No estate is thereby created; but, when the boundary is fixed by the parties, they hold up to it by virtue of their title deeds, and not by virtue of the parol transfer. In other words they agree, not that one shall give the other land that he did not own before, but that the line drawn is the proper division line as fixed by their respective deeds, and there thus being no transfer of real property contemplated by the agreement it can by no possibility come within the statute. Bobo v. Richmond, 25 Ohio St. 115; Hagey v. Detwiler, 35 Pa. St. 409; Jacobs v. Moseley, 91 Mo. 457; Grigsby v. Combs (Ky. 1893), 21 S. W. Rep. 37; McCaleb v. Pradat, 25 Miss. 257. It must be clearly borne in mind, however, that adjoining land owners cannot, by a parol agreement changing the location of a known and established dividing line between them transfer land from one to the other under cover of a agreement o determine a boundary ine. Trager v Jenkins, 136 U. S. 651, 10 Sup. Ct. Rep. 1074; May v Baskin, 20 Miss. 428; Turner v. Baker, 76 Mo. 343; Miller v. McGlann, 63 Ga. 435; Davis v. Townsend, 10 Barb. (N. Y.) 333; Pasley v. English, 5 Grat. (Va.) 141; Weeks v. Martin, 57 Hun, 589, 10 N. Y. Supp. 656; Walker v. Devlin, 2 Ohio St. 593.

JETSAM AND FLOTSAM.

A SYMPOSIUM ON THE QUESTION OF THE CONSTITUTIONALITY OF LEGISLATION IMPOSING GREATER LIABILITY ON A CORPORATION THAN UPON NATURAL PERSONS.

In Mississippi, discussion has reached a white heat over the question of the constitutionality of legislation imposing greater liability on a corporation than upon natural persons. The legislature of Mississippi passed a law providing that "every employee of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employees as are allowed by other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant," etc., and that knowledge of defective appliances, etc., shall constitute no defense. The supreme court in passing on the constitutionality of this act was favored by such exceptionally able arguments by some of the greatest lawyers in the state, that the reporter was directed to report them in full. It will probably not constitute a contempt of the Supreme Court of Mississippi to say that these arguments give evidence of a clearer comprehension of the principles involved than the opinion of the court itself. And since the court's decision is hardly more than advisory, as it will be appealed to the United States Supreme Court, we give below a symposium of the briefs filed. The question arose by reason of the certification by the trial court in the case of Ballard v. Mississippi Cotton Oil Co., of certain questions relating to the constitutionality of the legislation referred to.

The Legislation is Unconstitutional.—Smith, Hirsh and Landau argued as follows that such legislation is unconstitutional:

"We note that the directions of the honorable court really subdivide the questions for argument into several different propositions, and we shall therefore so divide and discuss them.

'There are some classes of corporations, as railroads, as to which it is clearly constitutional. May there not be some as to which it would be unconstitutional; the statute embracing all corporations, and no natural persons? Must not the distinction be based on some difference inhering in the very nature of the business, as, for instance, the dangerous character of steam as an agency in railroads?' As to the two questions propounded in this proposition, we submit unhesitatingly that the overwhelming weight of authority shows that these questions must be answered in the affirmative.

In the leading case of Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. Ed. 107, the Supreme Court of the United States uses the language: 'But the hazardous character of the busi-

ness of operating a railway would seem to call for special legislation, with respect to railroad corporations, having for its object the protection of its employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination.' See, also, the case of Akeson v. C., B. & Q. R. Co., 106 Iowa, 54, 75 N. W. Rep. 676.

In the case of Cotting v. Kansas Stockyards Co., 183 U. S. 79, 22 Sup. Ct. Rep. 30, 46 L. Ed. 92, will be found a full and elaborate discussion of the doctrine of equality before the law, and of the effect of the fourteenth amendment to the constitution of the United States. The court had under consideration an act of the legislature of the state of Kansas, passed in 1897, designed to regulate charges of stockyards. It expressly limited the operation of the act to those stockyards which for the preceding 12 months should have had an average daily receipt of not less than 100 head of cattle, or 300 head of hogs, or 300 head of sheep, and these were declared to be public stockyards, and a certain schedule of charges were fixed for such stockyards. On page 112, 183 U. S., and page 30, 22 Sup. Ct. Rep., 46 L. Ed. 92, the court in that case uses this language: 'This statute is not simply legislation in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do.' We say that the act of the legislature of the state of Mississippi is not based upon any inherent difference in the character of the business, but is based solely upon the fact that the proprietors of the business have seen fit to incorporate this business, as a matter of business precaution and prudence, rather than conduct it in their individual names. The court in the Cotting case were unanimous in reversing the judgment of the supreme court of the state of Kansas, on the ground that the statute of Kansas was in violation of the fourteenth amendment to the constitution of the United States. We contend that this act is unconstitutional because it is violative of the fourteenth amendment to the constitution of the United States. The record shows that the defendant was chartered as a corporation on February 18, 1902. The act of the legislature (chapter 66) was passed in January, 1898, and singles out and confers certain rights of action in favor of employees of corporations, and imposes liabilities upon corporations in certain states of case therein stated, but does not impose the same liabilities upon persons. In other words, it arbitrarily singles out corporations, and puts them upon another and a different footing from that of persons. We contend that this is violative of the fourteenth amendment to the constitution of the United States. We contend that this is a denial to corporations within the jurisdiction of the state of Mississippi of the equal protection of the laws. That corporations are persons within the meaning of the fourteenth amendment has been repeatedly held by the Supreme Court of the United States.

In the case of Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. Rep. 730, 28 L. Ed. 1145, the same doctrine is enunciated by the supreme court, citing the case of Barbier v. Connolly, 113 U. S. 27, and having under consideration the same ordinance. In Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 17 Sup. Ct. Rep. 255, 41 L. Ed. 666, this idea is further elaborated.

The last utterance of the supreme court that we have found on this subject is in Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136, 44 L. Ed. 192, construing a statute of Indiana approved March 4, 1903. Section 1 of this statute provides 'that every railroad or other corporation, except municipal,' etc. This statute was upheld in a case against a railroad for the obvious reason that the supreme court had prior to that time, held that to impose such liabilities upon railroads was not unconstitutional, owing to the hazardous character of the business of operating a railroad (see Missouri Pac. R. R. v. Mackey, 127 U. S. 205, 8 Sup. Ct. Rep. 1161, 32 L. Ed. 107), and because it was perfectly permissible, under the familiar rule of construction, to uphold that part or so much of that statute. The rule is too familiar to need quotations that, where a part of a statute can be maintained, it is the duty of the court to maintain it. Chapter 66, p. 85, of the laws of Mississippi of 1898 does not, however, do this. It puts all corporations in one class, singles out corporations, arbitrarily classifies them, and leaves every natural person doing the same business as a corporation free from the liability imposed by chapter 66. It does not say that any corporation employing the dangerous agency of steam or any corporation employing the dangerous agency of electricity, or any railroad corporation, nor does it say that any employee of any person or corporation shall have the rights, remedies, etc., but arbitrarily selects corporations."

The Law is Constitutional.—T. H. Campbell, argued that such legislation was constitutional, as follows:

"At the last term of this court this case was remanded for reargument on the following points:

First, whether the act embracing all corporations and no natural persons was unconstitutional. Should not the act on its face have classified the corporations in regard to the nature of the business engaged in by corporations? We think not. Any attempt to classify the corporations as to the nature of its business must necessarily have rendered it obnoxious to the amendment, unless the classification is so general that it amounts to about the same as the act under consideration. The real question is, does the fact that natural persons are not included in the act render it unconstitutional? We think not. We think so because the classification of corporations is in itself sufficient, and not arbitrary. In the case of Pembina Mining Co. v. State of Pennsylvania, 125 U. S. 189, 8 Sup. Ct. Rep. 737, 31 L. Ed. 650, the court says: 'The equal protection of law which these bodies [corporations] may claim is only such as is accorded similar associations within the jurisdiction of the state.'

The mere fact that natural persons are not included in the act does not render it obnoxious to the provisions of the fourteenth amendment. If so, why does the supreme court, in the case of Tullis v. Erie R. R. Co., 175 U. S. 348, 20 Sup. Ct. Rep. 136, 44 L. Ed. 192, uphold almost a similar statute as to railroads. The language of the Indiana act was 'railroad and other corporations.' It did not include individuals. There are a number of individuals in the United States who have the means to operate railroads, and doubtless there are instances where railroads are owned and operated by individuals; yet the Supreme Court of the United States in the above-cited case holds that such legislation as under consideration now is not in contravention of the constitution. The only ground upon which

counsel attacks the act of 1898 is that it does not extend its provisions to natural persons, and therefore it is class legislation; and the court, in its order remanding the case, seems to intimate that the fact that natural persons are not included in the act would render it unconstitutional, as it applies to all corporations and no natural persons.' But on this point the case of Tullis v. Erie R. R., 175 U. S. 348, 20 Sup. Ct. Rep. 136 44 L. Ed. 192, it seems to me, is decisive. If the fact that the omission from the act of natural persons would render the act in conflict with the fourteenth amendment, then the court would have said that the act imposed liabilities and restrictions upon corporations operating railroads, but does not impose the same liabilities or restrictions upon natural persons operating railroads, and is therefore unconstitutional. If the addition of the words 'natural persons' to the act of 1898 under consideration would make it consistent with the provisions of the fourteenth amendment, as the court would seem to think, and counsel for appellees undoubtedly think, then the omission of the words 'natural persons' from the Indiana act construed in Tullis v. Railroad, *supra*, should certainly have rendered the Indiana act obnoxious to the fourteenth amendment; yet the Supreme Court of the United States did not so hold. It seems to me there is no escape from this argument.

Another reason why the omission from the act of 1898 of natural persons does not render the act in conflict with the fourteenth amendment is the vast difference between natural persons and corporate persons, which would render this classification reasonable. The individual man is created by God Almighty, and the corporate man by legislative enactment. The latter frequently grows into a giant, fed upon the special privileges accorded him at his birth—a giant in comparison to which the gaints slain by the valorous Jack are mere pigmies. The natural man is supposed to have, and usually has, a conscience, and in dealing with his fellow men is actuated by moral motives; while the other is known as the 'soulless man,' and often 'neither regards man nor fears God.' The natural man is more easily amenable to the criminal laws of the land, and can be reached with greater, ease and facility. The other, even if born in this state often resides out of it—that is, those who are responsible for the conduct and management of the corporation—and cannot be reached in their persons by the majesty of the law. The corporation being also the creature of legislative enactment, the legislature can pass many laws and restrictions upon its management and control which it would not be proper to enact as to the conduct of individuals. This principle is recognized in the case of Missouri R. R. Co. v. Mackey, 127 U. S. 208, 8 Sup. Ct. Rep. 1162, 32 L. Ed. 107.

In the case of Minneapolis & St. Louis Co. v. Herrick, 127 U. S. 210, 8 Sup. Ct. Rep. 1176, 32 L. Ed. 109, the Supreme Court of the United States upholds a similar statute as to railroads, and does so on the authority of the Mackey Case in the same volume. This case was carried up from the supreme court of the state of Minnesota, and is reported 16 N. W. Rep. 413, 31 Minn. 11, 47 Am. St. Rep. 771. The very point was there raised that the restrictions placed upon railroad companies were not made to apply to individual persons, and the court held that the omission to include private persons did not render the act of Iowa in conflict with the fourteenth amendment and gave as one, if not the chief, reason that these corporations were the creatures of the legislature, and, being the creatures of the legislature, it could impose restrictions upon them in their dealings with their employees, so as to insure the safety of the said employees. In the case of Missouri Pacific R. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. Ed. 463, in the first two pages of the decision (pages 519, 520, 115 U. S., and page 112, 6 Sup. Ct. Rep. 29 L. Ed. 463), makes almost similar observations as the Minnesota court as to the danger of carrying too far the provisions of the fourteenth amendment, and applying it to cases it was never intended for.

In conclusion, I wish to say that I truly believe that the constitutionality of the act under consideration can be successfully defended upon both sound and legal moral principles. The vast difference between the legal and political status of natural persons and corporate persons, and the great difference between the relation which the two bear to society, taken in connection with the fact that corporations are the creatures of the law, makes it perfectly competent for the legislature to impose restrictions of the character contained in the act of 1898 on corporations without imposing the same restrictions and liabilities upon natural persons, and by so doing such legislation is not rendered inimical to any provision of either the state or the United States constitution."

The Court's Decision. — The court holds the act unconstitutional as imposing restrictions on all corporations, without reference to any differences arising out of the nature of their business, not imposed on natural persons, and therefore denying corporations the equal protection of the law. This decision is reported in 34 So. Rep. 533. The court dismisses the most important argument in favor of the constitutionality of the act, as follows:

"It is objected that the United States supreme court decisions would uphold this statute upon the ground that it is perfectly competent to confer upon the employees of all corporations these remedies and rights, whilst denying them to natural persons, because, and only because, of the fact that they are corporations, the creatures of the state, existing and drawing all their vast privileges from the state. It is said that these considerations constitute such a great difference between the natural person and the corporation as to uphold such legislation. And the Ellis Case, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. Ed. 666, is cited; the court saying there 'that it was a sufficient answer, in that case, to the argument that the act would be valid if it extended the penalties to all corporations, and that as a matter of fact that statute did not so extend the penalties to all corporations.' But this is far from decision to that effect. It is a mere comment *arguendo*. Again, it is said that in Pac. Express Co. v. Seibert, 142 U. S. 352, 12 Sup. Ct. Rep. 250, 35 L. Ed. 1035, it was held that 'the constitution is not violated by special legislation, applied equally to artificial bodies;' and numerous cases are cited from Judge Rose's notes on this case to sustain this proposition. But the perfect answer to this is that all these are cases as to the power of taxation, a subject wholly different from that under investigation here."

HUMOR OF THE LAW.

Solicitor—You want to be made bankrupt, do you? Very well, I'll put it through for you. Just give me a check for $100 on account of preliminary expenses.

Client—B-but I haven't got any money at all.

Solicitor—Then why the dickens do you come to me? Hang it all, man, you are bankrupt!

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT STATED — Setting Aside.—Where a settlement is entered into in reliance on the books kept by one of the parties, and it is thereafter discovered that such party has not accounted for all the money received, the settlement will be set aside, though there may have been no intentional fraud. — Leidigh v. Keever, Neb., 96 N. W. Rep. 106.

2. ACTION — Joinder of Causes. — A cause of action against one in her individual capacity held not susceptible of being joined with one against her as the surviving wife of the member of a partnership. — First Nat. Bank v. Valenta, Tex., 75 S. W. Rep. 1087.

3. ACTION — Misjoinder. — Suit by stockholder of corporation for a receiver and an accounting between it and another corporation, made defendant, held not demurrable for misjoinder of causes of action. — Case v. Hudson Co., 88 N. Y. Supp. 577.

4. ADMIRALTY — Personal Injuries.—An action in tort to recover for a personal injury received by libelant by falling from a dock when attempting to go on board a vessel is not maritime, nor within the jurisdiction of a court of admiralty. — The Albion, U. S. D. C., D. Wash., 123 Fed. Rep. 189.

5. ADOPTION — Legal Rights and Capacities. — Where the statutes authorize a complete adoption, the child adopted acquires all the legal rights and capacities, including that of inheritance of a natural child.—Virgin v. Marwick, Me., 55 Atl. Rep. 520.

6. ADVERSE POSSESSION — Color of Title.—Where one enters on land without color of title, his possession cannot be extended by construction, as is done in favor of one entering under color of title. — Hackett v. Webster, Md., 55 Atl. Rep. 480.

7. ALIENS — Exclusion for Disease. — The decision of the board of special inquiry, rejecting an immigrant on the ground that he has a loathsome or a dangerous contagious disease, cannot be reviewed by the courts, where the jurisdictional fact of the alienage of the immigrant is shown. — *In re* Neuwirth, U. S. C. C., S. D. N. Y., 123 Fed. Rep. 347.

8. ALIENS — Right of Appeal.—An appeal by the United States does not lie from an order of a commissioner discharging a Chinese person arrested for being unlawfully in this country. — United States v. Mar Ying Yuen, U. S. D. C., W. D. Tex., 123 Fed. Rep. 159.

9. ALIENS — Right to Inherit.—Under Laws 1874, p. 317, ch. 261, and Laws 1875, p. 32, ch. 38, nonresident aliens could inherit land as if they were residents of the United States, as could also the heirs of those who died before, as well as after, their enactment. — Kelly v. Pratt, 88 N. Y. Supp. 636.

10. APPEAL AND ERROR — Bankruptcy.—Where a trustee in bankruptcy sued to recover goods of a bankrupt, alleged to have been transferred preferentially to defendant, the action is one at law, and not in equity, so that the court cannot review the findings of fact. — Hodges v. Kohn, S. Car., 45 S. E. Rep. 102.

11. APPEAL AND ERROR — Judgment. — A judgment erroneously entered against a plaintiff should not be affirmed because the court erred in overruling a demurrer to the declaration. — Anderson v. Broward, Fla., 34 So. Rep. 897.

12. APPEAL AND ERROR — Thresher's Lien. — In an action to foreclose a thresher's lien, failure of the lien claimant to set forth in such statement the quantity threshed was fatal to his lien, under Rev. Codes 1899 § 4824. — Moher v. Rasmusson, N. Dak., 95 N. W. Rep. 152.

13. APPEARANCE—Jurisdiction Obtained.—Where, after a default judgment, defendant sued out a writ of error and the judgment was affirmed, the supreme court acquired jurisdiction of defendant's person, which cured any defect in the service of the original summons.—Taylor v. Sledge, Tenn., 75 S. W. Rep. 1074.

14. ARMY AND NAVY — Court Martial.—A court martial is empowered by the sixtieth article of war to sentence a person to imprisonment at hard labor, or to a penitentiary where hard labor is a part of the discipline, when the offense of which he is convicted is one for which the civil tribunals could impose a like sentence. — *In re* Langan, U. S. C. C., E. D. Mo., 123 Fed. Rep. 182.

15. ASSAULT AND BATTERY — Presumptions of Innocence. — In a civil action for damages for assault committed with a loaded firearm, the presumption of defendant's innocence applicable in criminal cases does not apply.—Kurz v. Doerr, 88 N. Y. Supp. 786.

16. ASSUMPSIT, ACTION OF — Defense. — It may be shown, under a plea of the general issue in *assumpsit*, that plaintiff by his own act prevented defendant from performing the contract sued on. — Kelly v. Fahrney, U. S. C. C. of App., Seventh Circuit, 123 Fed. Rep. 280.

17. ATTACHMENT — Services on Appeal.—The supreme court cannot allow, in an action on the bond for the wrongful issuance of attachment, a sum for the services of plaintiff's attorneys in resisting an appeal. — Klimer v. Gallaher, Iowa, 95 N. W. Rep. 180.

18. ATTORNEY AND CLIENT — Lien for Services. — An attorney has a lien upon the securities of his client which are in his hands for services which he has rendered.—*In re* Sweeny, 88 N. Y. Supp. 680.

19. BANKRUPTCY — Appellate Jurisdiction. — The provision of Bankr. Act 1898, § 24*a*, vesting the supreme court with certain appellate jurisdiction from courts of bankruptcy, has no relation to appeals from the circuit court of appeals. — Hutchinson v. Otis, Wilcox & Co., U. S. C. C. of App., First Circuit, 123 Fed. Rep. 14.

20. BANKRUPTCY — Attacking Mortgage. — Under the law of Wisconsin relating to chattel mortgages, a mortgage, although not properly filed, cannot be attacked by the trustee in bankruptcy of the mortgagor in behalf of general creditors, where the mortgagee took possession of the property before the filing of the petition in bankruptcy. — *In re* Antigo Screen Door Co., U. S. C. C. of App., Seventh Circuit, 123 Fed. Rep. 249.

21. BANKRUPTCY — Evidence. — The books of a bankrupt and the schedules and inventory and appraisement are competent evidence on the question of insolvency within four months of the date of filing the petition.—*In re* Docker-Foster Co., U. S. D. C., E. D. Pa., 123 Fed. Rep. 190.

22 BANKRUPTCY — Fraudulent Conveyance. — Evidence, in suit by trustee in bankruptcy to avoid bankrupt's conveyance as fraudulent, held to show that it was not such. — Jacobs v. Van Sickel, U. S. D. C., D. N. J., 123 Fed. Rep. 340.

23. BANKRUPTCY — Homestead Exemption. — A bankrupt should be permitted to retain the land set apart as his homestead exemption, although valued at more than the limit of exemption on payment of the excess. — *In re* Manning, U. S. D. C., D. S. Car., 123 Fed. Rep. 180.

24. BANKRUPTCY — Jurisdiction of Court. — A court of bankruptcy has jurisdiction and power to order a bankrupt to surrender to his trustee money or property belonging to his estate, found to be in his possession or under his control, and to enforce obedience to such order by imprisonment for contempt. — *In re* Gerstel, U. S. D. C., S. D. Ill., 123 Fed. Rep. 166.

25. BANKRUPTCY — Jurisdiction of Court. — A district court has no power to make an order, on the application of the trustee of a bankrupt whose estate is being administered in another district, requiring persons residing within the district to appear before a referee for examination concerning the acts, conduct, and property of the bankrupt. — *In re* Williams, U. S. D. C , W. D. Tenn., 123 Fed. Rep. 321.

26. BANKRUPTCY — "Liquidated by Litigation." — The claim of a surety for a bankrupt is not "liquidated by litigation," so as to entitle it to be proved after the year fixed by the statute, because of litigation between the principal creditor and the surety to determine the latter's liability.—*In re* E. O. Thompson's Sons, U. S. D. C., E. D. Pa., 123 Fed. Rep. 174.

27. BANKRUPTCY — Mortgage.—Under Bankr. Act 1898, a chattel mortgage held not subject to attack by trustee in bankruptcy of mortgagor. — Skilton v. Codington, 83 N. Y. Supp. 351.

28. BANKRUPTCY — Partnership. — Under Bankr. Act 1898, a trustee of a firm and the copartners as individuals, who sell the assets of the bankrupt's estate, held to confer on the purchasers the right to advertise as the successors to the bankrupt firm.—Freeman v. Freeman, 83 N. Y. Supp. 478.

29. BANKRUPTCY — Powers of Court.—A court of bankruptcy has general authority to set aside a sale of a bankrupt's property, made under an order of a referee, although such order did not require the sale to be made subject to the court's approval, on the ground of misconduct of the trustee in making it, and without proof of fraud on the part of the purchaser; and such authority will be exercised when it is to the interest of the estate. — *In re* Shea, U. S. D. C., D. Mass., 122 Fed. Rep. 742.

30. BANKRUPTCY—Preferences.—Bankr. Act 1898, § 60c, allowing new credits to be set off against preferences rece ved by the creditor, applies only to preferences recoverable under clause "b." — *In re* Jones, U. S. D. C., D. S. Car , 123 Fed. Rep. 128.

31. BANKRUPTCY—Preferences.—Circumstances held to show that creditor, receiving preference from bankrupt within four months of adjudication, had no reasonable ground to believe that preference was intended, and hence that conveyance was not voidable. — Jacobs v. Van Sickel, U. S. C. C., E. D. Pa., 123 Fed. Rep. 346.

32. BANKRUPTCY — Priority of Debts.—Bankr. Act 1898, allowing priority for debts entitled to priority under state laws, does not apply to debts for wages, as the exclusive rule in regard to such debts is supplied by clause 4. — *In re* Slomka, U. S. C. C. of App., Second Circuit, 122 Fed. Rep. 630.

33. BANKRUPTCY—Proceedings for Review.—An appeal duly taken from an order in bankruptcy may be treated by the appellate court as a petition for revision, where only a question of law is presented and the latter is the proper mode of review. — Chesapeake Shoe Co. v. Seldner, U. S. C. C. of App., Fourth Circuit, 122 Fed. Rep. 593.

34. BANKRUPTCY — Provable Claims.—The liability of a bankrupt as surety on the bond of an administrator is not a fixed liability absolutely owing, and as such provable against his estate, where there has been no final adjudication of the liability of his principal. — *In re* Wiseman, U. S. D. C., E. D. Pa., 123 Fed. Rep. 185.

35. BANKRUPTCY—Review on Appeal.—A question of fact determined by a referee, whose finding was disapproved in an opinion of the district court, which, however, entered no order therein from which an appeal could be taken, held reviewable on an appeal from a subsequent order of the court entered in conformity to its previous opinion.—Rush v. Lake, U. S. C. C. of App., Ninth Circuit, 122 Fed. Rep. 561.

36. BANKRUPTCY—Secured Creditor.—Though the city of Philadelphia has a lien on real estate for municipal taxes, it is not a secured creditor, within the meaning of the bankruptcy act, under section 1, cl. 23, Act July 1, 1898.—*In re* Harvey, U. S. D. C., E. D. Pa., 122 Fed. Rep. 745.

37. BANKRUPTCY—Service of Process.—Service on involuntary bankrupt, by leaving subpœna and copy of the petition at his usual place of abode, held sufficient.—*In re* Risteen, U. S. D. C., D. Mass., 122 Fed. Rep. 732.

38. BANKRUPTCY— Time for Proving Claim. — Under Bankr. Act July 1, 1898, § 12, cls. "a," "b," "e," effecting composition with creditors held not to extend time creditor has to prove his claim.—*In re* Brown, U. S. D. C., D. Colo., 123 Fed. Rep. 336.

39. BANKRUPTCY — Trust Funds. — One recovering money which came into the hands of the receiver of an insolvent national bank, as a trust fund of which she was the owner, is not entitled to interest thereon.—Hallett v. Fish, U. S. C. C., D. Vt., 123 Fed. Rep. 201.

40. BANKRUPTCY — Unsecured Proof. — The separate proof of an unsecured claim does not debar a creditor of a bankrupt from subsequently proving a balance due on a secured claim after the security has been exhausted.—*In re* Ball, U. S. D. C., D. Vt., 123 Fed. Rep. 164.

41. BANKRUPTCY—Validity of Bonds.—Bonds pledged by a corporation to secure notes executed for an indebtedness contracted by another, but which the corporation at the time assumed with the consent of the creditor, are not pledged for an antecedent indebtedness of the corporation.—William Firth Co. v. South Carolina Loan & Trust Co., U. S. C. C. of App., Fourth Circuit, 122 Fed. Rep. 569.

42. BILLS AND NOTES—Consideration.—In the absence of inquiry, the omission to mention a debt of a corporation, a transfer of whose stock is the consideration for a note, will not justify a finding of a fraudulent concealment.—Furber v. Fogler, Me., 55 Atl. Rep. 514.

43. BROKER—Commissions.—The existence of a custom cannot fasten on a property owner the liability to pay commissions simply because he leased property to one induced by a broker to take it.—Brady v. American Machine & Foundry Co., 83 N. Y. Supp. 883.

44. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—In the absence of contractual provision, a borrowing stockholder is not entitled to credit from an insolvent building and loan association for dues paid on his stock. —Sleeper v. Winkel, U. S C. C., E. D. Pa., 122 Fed. Rep. 736.

45. CARRIERS—Care Required.—Common carrier, approaching place of danger, must use utmost care to protect its passengers from injury.—Bosworth v. Union R. Co., R. I., 55 Atl. Rep. 490.

46. CARRIERS—Injury to Passenger.—The burden is on a person injured by stepping on or off a moving car, and receiving an injury thereby, to show why the case should go to the jury.—Hunterson v. Union Traction Co. Pa , 55 Atl. Rep. 543

47. CARRIERS—Time Allowed for Alighting.—A railroad company, after waiting sufficient time at station, held not required to ascertain that all passengers desiring to alight have done so.—Shealey v. South Carolina & G. Ry. Co., S. Car., 45 S. E. Rep. 119.

48. CARRIERS — Unlawful Discrimination. — Railroad cannot refuse to carry papers on an early morning train, put in service by special contract with a publisher, on the ground that it has other trains later in the day.—Memphis News Pub. Co. v. Southern Ry. Co., Tenn., 75 S. W. Rep. 941.

49. CHAMPERTY AND MAINTENANCE—Interest in Action.—Whether the promise of attorneys to pay the expenses incident to the collection of their client's claim was made to induce their employment by him held, under the evidence, to be for the jury.—Ft. Worth & D. C. Ry. Co. v. Carlock & Gillespie, Tex., 75 S. W. Rep. 931.

50. CHATTEL MORTGAGES — Execution Purchaser. — Where mortgage of chattels is not filed at the date of a levy, a purchaser at execution sale against the mortgagor will take free of the mortgage.—Johns v. Kamarad, Neb., 96 N. W. Rep. 118.

51. CHATTEL MORTGAGES—Failure to File.—The failure to file a chattel mortgage for about five years rendered the same void as to such creditors only whose debts existed prior to the filing —Skilton v. Codington, 83 N. Y. Supp. 351.

52. COMMERCE — Foreign Insurance Companies. — A state statute, imposing a penalty for transacting business within the state as agent for a foreign insurance company which has not complied with the laws of the state, is not in violation of the constitution of the United States because it applies to contracts of insurance on property without, as well as within, the state.—Adler-Weinberger S. S. Co. v. Rothschild & Co., U. S. C. C., E. D. Pa., 123 Fed. Rep. 145.

53. CONSTITUTIONAL LAW — Class Legislation. — The "four-mile law," prohibiting the sale of intoxicating liquors within four miles of institutions of learning, held not unconstitutional as class legislation.—Webster v. State, Tenn., 75 S. W. Rep. 1020.

54. CONSTITUTIONAL LAW—Local Option Law.—A state or local prohibitory law is not in contravention of the federal constitution, as to a dealer in or manufacturer of liquors, on the ground that it deprives him of his property without due process of law.—August Busch & Co. v. Webb, U. S. C. C., E. D. Tex., 122 Fed. Rep. 655.

55. CONTEMPT — Fabricating Evidence. — Defendants adjudged guilty of a contempt of court in fabricating certain pages of a directory alleged to infringe a copyright, and presenting the same to the court as evidence on the hearing of a motion for a preliminary injunction. —Chicago Directory Co. v. United States Directory Co. U. S. C. C., E. D. Pa., 123 Fed. Rep. 193.

56. CONTRACTS—Implied Compensation.—A member of a committee supervising a work for several corporations held entitled to recover for services as engineer.—Wagner v. Edison Electric Illuminating Co. of Carondelet, Mo., 75 S W. Rep. 966.

57. CONTRACTS—Invalid Agreement. —An agreement chilling the bidding at a sale of a lease of a dock at action by the city of New York held against public policy and void.—Coverly v. Terminal Warehouse Co., 83 N. Y. Supp. 369.

58. CONTRACTS—Variance.—In an action to recover on a contract, where the complaint alleged performance, it was error to admit evidence excusing fai ure to perform —Rowe v. Gerry, 83 N. Y. Supp. 740.

59. CONVERSION—Decedent's Real Estate —A conversion of real estate, authorized by a will for the purpose of division, does not make it personalty, so far as concerns its liability for debts of the estate. — Taylor v Crook, Ala., 34 So. Rep. 905.

60. CORPORATIONS—Acts Affecting Interest.—Where a stockholder of a corporation has not participated in a scheme of its directors to induce the stockholders to exchange their stock for stock in another corporation, he cannot complain of the acts of such directors.—Rosenbaum v. Rice, 83 N. Y. Supp. 494.

61. CORPORATIONS—Christian Science. — Application for a charter of a corporation to instruct in the practice of medicine on the theory of Christian Science held properly denied.—*In re* First Church of Christ, Scientist, Pa., 55 Atl. Rep. 536.

62. CORPORATIONS—Collateral Attack.—The legality of the organization of a corporation cannot be attacked collaterally in a private suit against it, but only in a direct action by the state.—Armour v. E. Bement's Sons, U. S. C. C. of App., Sixth Circuit, 123 Fed. Rep. 56.

63. CORPORATIONS—Disposition of Property.—A disposition of property of a corporation, not objected to by any stockholder or creditor, cannot be objected to by any one, unless by the state in a proper proceeding.—Read v. Citizens' St. R. Co., Tenn., 75 S. W. Rep. 1056.

64. CORPORATIONS—Illegal Payments of Dividends.—A corporation's right to enforce a cause of action against a director for an illegal disposition of its capital in dividends is not impaired because such enforcement will be an advantage to stockholders.—Hutchinson v. Stadler, 83 N. Y. Supp. 509.

65. CORPORATIONS — Powers. — Where a corporation organized for the manufacture of malt and for the sale of grain purchases bank stock as an investment, its acts are unlawful.—Hunt v. Hauser Malting Co., Minn., 96 N. W. Rep. 85.

66. CORPORATIONS—Venue Against Foreign Corporation.—A suit against a foreign corporation may be instituted in any county in which the company has an agent or other representative.—Hocker v. Western Union Tel. Co., Fla., 34 So. Rep. 901.

67. CRIMINAL EVIDENCE Declarations of Accused.—The secretary and special agent of the New York society for the suppression of vice held entitled to testify an interview had with accused.—People v. Bushnell, 83 N. Y. Supp. 403.

68. CRIMINAL LAW—Illegal Seizure of Private Papers.—The illegal seizure of papers constitutes no ground for excluding them as evidence in the trial of an indictment of the person in whose possession they were found.—People v. Adams, 83 N. Y. Supp. 481.

69. CRIMINAL TRIAL—Former Jeopardy. —On prosecution for murder, a plea of former jeopardy, offered after the state had closed its case and accused had testified in his own behalf, held properly refused.—McNulty v. State, Tenn., 75 S. W. Rep. 1015

70. DAMAGES—Remoteness.—The damages claimed in a suit to recover the difference between the price at which cotton would have been sold and the lower price at which it was sold through defendant's negligence are not too remote for recovery.—Hocker v. Western Union Tel. Co., Fla., 34 So. Rep. 901.

71. DAMAGES — Tortious Destruction of Property. — The measure of damages for the negligent destruction of a boat is its value, and the owner is not entitled in addition to recover the value of its use during such time as would be required to rebuild it. — Ft. Pitt Gas Co. v. Evansville Contract Co., U. S. C. C. of App., Third Circuit, 123 Fed. Rep. 63.

72. DESCENT AND DISTRIBUTION — Public Lands. — A patent to the widow of a homestead settler who, after his death, completes the required residence and makes final proof, conveys the land to her absolutely.—McCune v. Essig, U. S. C. C. of App., Ninth Circuit, 122 Fed. Rep. 588.

73. DISCOVERY—Examination Before Trial.—Action of defendant in leaving jurisdiction before application to reverse an order for the examination of defendant before trial held not to justify the continuance of the order as to him.—Boeck v. Smith, 83 N. Y. Supp. 428.

74. DISMISSAL AND NONSUIT—Waiver.—A defendant is not entitled to take advantage of an alleged discontinuance, where he did not avail himself of it at the earliest

period, but appeared and consented to a continuance after the discontinuance.—Hayes v. Dunn, Ala., 34 So. Rep. 944.

75. ELECTIONS—Certificate of Election.—Person holding certificate of election to a public office will be considered as entitled thereto against all the world except a *de facto* officer.—State v. Kersten, Wis., 95 N. W. Rep. 120.

76. EQUITY — Cross-Petition. — A cross-bill in equity must be *germane* to the original suit, and the new issues are limited to such as are necessary to decide the questions raised in the orignal suit. — Armstrong v. Mayer, Neb., 95 N. W. Rep. 51.

77. EQUITY — Limitations. — A proceeding to subject real estate to debts of decedent's estate being barred by limitations and the persons interested having set up the invalidity of the claim, its allowance may be revised on bill of review.—Taylor v. Crook, Ala., 34 So. Rep. 905.

78. ESTOPPEL — Bill of Review.—One who induces dismissal of an appeal on the ground that the decree is not final cannot afterwards claim, as against a bill of review, that it was final.—Taylor v. Crook, Ala., 34 So. Rep. 905.

79. EVIDENCE—Admission of Indebtedness.—A record in bankruptcy containing an admission of indebtedness on a note is admissible in evidence in a subsequent suit on the note between the parties to the bankruptcy proceedings.—Nicholson v. Snyder, Md., 55 Atl. Rep. 484.

80. EXCEPTIONS, BILL OF—Signature.—A bill of exceptions, signed at a subsequent term to that at which the trial was had, held available only for review of the order denying a new trial. — People's Savings Bank & Trust Co. v. Keith, Ala., 34 So. Rep. 925.

81. EXECUTION — Abandonment of Levy. — Where an officer effects a valid levy on ponderous personalty, that he leaves such property on the premises of the debtor, in charge of a custodian, who permits the debtor to use such property, is not an abandonment of the levy.—Meyer v. Michaels, Neb., 95 N. W. Rep. 63.

82. EXECUTORS AND ADMINISTRATORS — Accounting.—It is no defense to an action on an administration bond for the surety to plead that exceptions to the account of the administrator filed by a creditor of the estate had been withdrawn on part payment of his claim by the administrator.—Smith v. Rhodes, Ohio, 68 N. E. Rep. 7.

83. EXECUTORS AND ADMINISTRATORS — Construction of Will.—Power to sell real estate contained in will held vested in the executors.—Bedford v. Bedford, Tenn., 75 S. W. Rep. 1017.

84. EXECUTORS AND ADMINISTRATORS — Debts of Decedent.—To subject real estate to debts of decedent's estate there must be a proceeding with the persons interested in the real estate as parties, and a claim for the relief desired.—Taylor v. Crook, Ala., 34 So. Rep. 905.

85. EXECUTORS AND ADMINISTRATORS — Property Acquired.—Where an administrator discovered securities in a box of deceased, held for plaintiff, the administrator held such securities in his representative capacity, and not as a "finder." — Case v. Spencer, 83 N. Y. Supp. 697.

86. FIRE INSURANCE — Insurance of Cargo. — A cargo insurer is not discharged from liability because of the action of the master of the vessel, not owned by the cargo owners, in leaving an intermediate port on his voyage with his vessel in an unseaworthy condition.—Morse v. St. Paul Fire and Marine Ins. Co., U. S. C. C., D. Maine, 122 Fed. Rep. 748.

87. FIRE INSURANCE — Proofs of Loss. — Waiver of a condition in a fire policy requiring proofs of loss within 60 days, when once established, cannot be recalled, and forfeiture insisted on.—Dobson v. Hartford Fire Ins. Co., 83 N. Y. Supp. 456.

88. FIXTURES—Cotton Mill Machinery. — Machinery in a cotton mill held to be a fixture, and to pass under a mortgage as a part of the realty. — William Firth Co. v. South Carolina Loan & Trust Co., U. S. C. C. of App., Fourth Circuit, 122 Fed. Rep. 569.

89. FRAUDULENT CONVEYANCES — Future Earnings.—An assignment of a debtor's future earnings for the support of himself and his family held not fraudulent in law.—Dole v. Farwell, N. H., 55 Atl. Rep. 553.

90. FRAUDS, STATUTE OF—Performance Within a Year. —Recovery by an employee under a parol contract of employment, terminated by mutual consent, could not be defeated by employer's setting up statute of frauds.—Scheuer v. Monash, 83 N. Y. Supp. 253.

91. GAMING—Margins.—The deposit of a margin for the protection of a broker buying cotton for another does not necessarily imply that the contract is one where only a difference in price is to be paid.—Hocker v. Western Union Tel. Co., Fla., 34 So. Rep. 901.

92. GAMING—Turf Exchange.—One who keeps a house for the purpose of betting on horse races is guilty of keeping a gaming house, within Pen. Code 1895, § 398.—Thrower v. State, Ga., 45 S. E. Rep. 126.

93. GARNISHMENT—Fraudulent Assignments. — On attachment by trustee process, the plaintiff, as against the trustee, held not entitled to raise the question that an assignment by defendant of his future earnings was fraudulent in law.—Dole v. Farwell, N. H., 55 Atl. Rep. 553.

94. GARNISHMENT — Garnishee's Failure to Appear. — Under Code 1896, § 2195 it is error, on appeal by plaintiff from a justice's judgment discharging a garnishee, to render final judgment against the garnishee for failure to answer in the appellate court.—J. P. O'Connor & Co. v. Levystein, Ala., 34 So. Rep. 925.

95. GUARDIAN AND WARD—Right to Sue.—The failure of a guardian to obtain the right to sue on infant's behalf, and to give the security required by statute, is a jurisdictional defect, which is fatal to the judgment.—Muller v. Naumann, 83 N. Y. Supp. 488.

96. HIGHWAYS—Runaway Team. — The mere running away of a team of horses does not necessarily imply that the driver was negligent.—McGahie v. McGlennen, 83 N. Y. Supp. 692.

97. HUSBAND AND WIFE—Alienation of Wife's Affections.—A copy retained by a husband of a letter sent by his wife to defendant held admissible, and not to acquire a privileged character because retained by him.—Weston v. Weston, 83 N. Y. Supp. 528.

98. INFANTS—Trusts.—Equity will not refrain from exercising its power to change a trust scheme, so as to effectuate testator's intention, because two of the beneficiaries are infants, or because objections are made in behalf of one of them. — Pennington v. Metropolitan Museum of Art, N. J., 55 Atl. Rep. 468.

99. INJUNCTION—Boycott.—Attempts by members of a labor union to compel compliance of the employer with their demands, by means of a boycott, are unlawful, and will be enjoined.—Martin v. McFall, N. J., 55 Atl. Rep. 465.

100. INJUNCTION—Interest in Property.—Property owners, who own no property abutting on a street about to be closed by a city contract affecting the street, have no special or peculiar interest authorizing them to restrain the execution of the contract.— Wilkins v. Chicago, St. L. & N. O. R. Co., Tenn., 75 S. W. Rep. 1026.

101. INTOXICATING LIQUORS—Sale to Minors.—Consent of a parent to certain liquor dealers selling liquor to his minor son held no defense to an action for a sale to him by another dealer. — Roach v. Springer, Tex., 75 S. W. Rep. 983.

102. JURY — Claims Against Estate. — Under Alaska Code, tit. 2, § 795 (Act June 6, 1900, ch. 786; 31 Stat. 458), and Alaska Code, ch. 15, § 871 (Act June 6, 1900, ch. 786, 31 Stat. 395), contestant of a claim against a decedent's estate in proceedings in the district court held not entitled to jury trial under Const. U. S. Amend. 7. — Esterly v. Rua, U. S. C. C. of App., Ninth Circuit, 122 Fed. Rep. 609.

103. JUDGMENT—Conclusiveness of Default. — A judgment by default is conclusive against the parties of all matters properly pleaded and averred in the declaration.—Taylor v. Sledge, Tenn., 75 S. W. Rep. 1074.

104. JUDGMENT—Construction. — Where the construction of a will could have been settled with only the original parties before the court, the decree would not have been binding, as *res judicata*, on proper parties not brougt in.—Katzenberger v. Weaver, Tenn., 75 S. W. Rep. 937.

105. JUDGMENT—False Allegation.—Where judgment is rendered on default without notice to defendant, a false allegation by plaintiff of a material fact is a fraud on the court.—Tremblay v. Ætna Life Ins. Co., Me., 55 Atl. Rep. 509.

106. JUDGMENT—Motion to Set Aside. — The remedy of a party desiring to be relieved from his stipulation, pursuant to which an interlocutory judgment was entered, held to be by motion to set aside the judgment. — Aronson v. Sire, 83 N. Y. Supp. 362.

107. LANDLORD AND TENANT — Dangerous Premises.—That an owner surrendered leased premises to his lessee will not relieve him of liability to third persons, where the premises were at the time in a condition dangerous to the public.—Isham v. Broderick, Minn., 95 N. W. Rep. 224.

108. LARCENY — Appropriation of Public Property — New York city physician, charging and collecting for free antitoxin furnished him for a poor patient, held guilty of larceny.—People v. Lavin, 83 N. Y. Supp. 630.

109. LICENSES—Money Lenders.—Placing money lenders on personal property in a class different from banks for license taxing held not unconstitutional.—Cowort v. City Council of Greenville, S. Car., 45 S. E. Rep. 122.

110. LIFE INSURANCE—Assignment.—An assignment of a life policy, executed in accordance with its terms by the insured and the only beneficiary, vests the assignee with the entire legal interest. — Tremblay v. Ætna Life Ins. Co., Me., 55 Atl. Rep. 509.

111. LIFE INSURANCE—Beneficiary. — Change of beneficiary held not defeated by death of insured prior to the issuance by the association of the new certificate.—Donnelly v. Burnham, 83 N. Y. Supp. 659.

112. LIFE INSURANCE—Designation of Beneficiary.—Insured was entitled to insure her life for the benefit of a man, without regard to whether they were lawfully married.—Ruoff v. John Hancock Mut. Life Ins. Co., 83 N. Y. Supp. 758.

113. LIMITATION OF ACTIONS — Absence from State.—Where a resident against whom a cause of action has accrued removes to another state, but comes to the state regularly each business day, he is not absent from the state, within Code Civ. Proc. § 23. — Webster v. Citizens' Bank, Neb., 96 N. W. Rep. 118.

114. LIMITATION OF ACTIONS — Ejectment. — The two years within which to bring a second action in ejectment held to begin to run from date of nonsuit in first action.—Richardson v. Riley, S. Car., 45 S. E. Rep. 104.

115. MANDAMUS — Proceedings.—*Mandamus* to enforce a judgment on municipal bonds held not a new suit against taxpayers, but a substitute for execution. — Kinney v. Eastern Trust and Banking Co., U. S. C. C. of App., Sixth Circuit, 123 Fed. Rep. 297.

116. MASTER AND SERVANT — Contributory Negligence. —The fact that dynamite might explode on an attempt to force it into a hole too small for its admittance held not a matter of scientific knowledge, so as to relieve servant so handling it from charge of contributory negligence.—Kopf v. Monroe Stone Co., Mich., 95 N. W. Rep. 72.

117. MASTER AND SERVANT — Unsafe Place.—A master cannot be charged because of failing to discover that a hole in the floor had been left uncovered, when left open by a fellow-servant. — Peet v. H. Remington & Son Pulp Paper Co., 83 N. Y. Supp. 524.

118. MINES AND MINERALS — Location Notices. — Notices of location of mining claims are to be liberally construed, and are not invalid because of mistakes therein as to courses and distances. — Walton v. Wild Goose Mining & Trading Co., U. S. C. C. of App., Ninth Circuit, 123 Fed. Rep. 209.

119. MINES AND MINERALS—Contract for Sale of Claim. —A contract for the sale of a mining claim construed, and the vendor held to have fully complied therewith to entitle him to recover the purchase money. — Griffin v. American Gold Min. Co., U. S. C. C. of App., Ninth Circuit, 123 Fed. Rep. 283.

120. MORTGAGES—Notice.—Possession by the purchaser of part of mortgaged lands is not notice to an assignee of the mortgage of release of such land therefrom.—Gibson v. Thomas, 83 N. Y. Supp. 552.

121. MORTGAGES — Priority. — A second mortgagee, without notice of a prior unrecorded mortgage, is not a mortgagee for a valuable consideration, within the recording act, if the purpose of the mortgage is to secure an antecedent debt. — O'Brien v. Fleckenstein, 83 N. Y. Supp. 499.

122. MOTIONS—Trial. — Where a preliminary motion is heard before the cause is heard on its merits, the court can announce its decision in a separate order or embody it in the decree. — Halk v. Stoddard, S. Car., 45 S. E. Rep. 140.

123. MUNICIPAL CORPORATIONS—Bankruptcy.—Where, after discharge in bankruptcy on an offer by the debtor to pay the original obligation in installments, the creditor insists on payment of the whole amount, the debt is not revived. — International Harvester Co. v. Lyman, Minn., 96 N. W. Rep. 87.

124. MUNICIPAL CORPORATIONS — Right to Examine Books. — That a person making application for examination of the books of a city is politically hostile to the city administration is no excuse for refusing to permit such examination. — State v. Williams, Tenn., 75 S. W. Rep. 948.

125. MUNICIPAL CORPORATIONS—Street Improvements. —An assessment for street improvements held not invalid because assessed in terms by the abutting foot, where the amount of the assessment did not exceed the special benefit to the land. — Shoemaker v. City of Cincinnati, Ohio, 68 N. E. Rep. 1.

126. MUNICIPAL CORPORATIONS — Taxation. — There is no special statutory limitation on the power of a city with respect to contracts for light and water, which render necessary a stipulation for a special tax.—Blanks v. City of Monroe, La., 34 So. Rep. 921.

127. NEGLIGENCE — Imputability. — Negligence of parents, etc., is not imputable to infant *sui juris*. — Lafferty v. Third Ave. R. Co., 83 N. Y. Supp. 405.

128. NEW TRIAL — Newly Discovered Evidence. — A sound discretion is reposed in the trial court on a motion for new trial for newly discovered cumulative evidence. —Riley v. Missouri Pac. Ry. Co., Neb., 95 N. W. Rep. 20.

129. NOTARIES — Impeaching Certificate. — A notary cannot impeach his official certificate, attached to an answer in a bankruptcy proceeding.—Nicholson v. Snyder, Md., 55 Atl. Rep. 484.

130. PARTNERSHIP — Accounting. — A proceeding on a petition by a surviving partner against the administrator of his deceased partner in the District Court of Alaska held equivalent to a suit in equity to settle accounts between partners. — Esterly v. Rua, U. S. C. C of App., Ninth Circuit, 122 Fed. Rep. 609.

131. PARTNERSHIP — Action for Price.—Persons carrying on business under assumed name, in violation of law, may recover of debtor for goods sold and delivered. —Doyle v. Shuttleworth, 83 N. Y. Supp. 609.

132. PARTNERSHIP — Authority of Partner.—An agreement by partner to share with plaintiff certain compensation for services payable to firm under an agreement with others, held binding on both partners.—Boice v. Jones, 83 N. Y. Supp. 230.

133. PAYMENT — Certificate of Deposit.—Where certificates of deposit were indorsed as security for the payment of the price of a farm, plaintiff's failure to protest the certificates on payment being refused held no defense to his action to recover such portion of the price. —Gallagher v. Ruffing, Wis., 95 N. W. Rep. 117.

134. PRINCIPAL AND AGENT — Notice to Agent. — An agent employed by the grantor in a deed of trust to collect the rents held unaffected by actual notice that the purchaser claimed the land and would hold the agent for the rents collected. — Embry v. Galbreath, Tenn., 75 S. W. Rep. 1016.

135. PRINCIPAL AND AGENT—Pledges.—A tender of the amount of a debt secured by a pledge to redeem the property held waived, where the pledgee refused to deliver, except on payment of other debts than those secured. — Memphis City Bank v. Smith, Tenn., 75 S. W. Rep. 1065.

136. RAILROADS — Barbed Wire Fence.—The construction of a barb-wire fence by a railroad on its own land did not render it liable for injuries sustained by one accidentally riding into it. — Bishop v. Gulf, C. & S. F. Ry. Co., Tex., 75 S. W. Rep. 1086.

137. RAILROADS — Communicated Fire. — In an action for the destruction of cotton by fire alleged to have been communicated by defendant's engine, the fact that plaintiff held an equitable title only to a part of the cotton sued for was immaterial.—Alabama Great Southern R. Co. v. Clark, Ala., 34 So. Rep. 917.

138. REFORMATION OF INSTRUMENTS—Mistake.—A deed will not be reformed for mistake, unless the terms of the real agreement are shown with such certainty that the proven averments of the bill will form a basis for the decree.—Keith v. Woodruff, Ala., 34 So. Rep. 911.

139. RELEASE—Joint Maker.—A parolrelease of one of several joint and several makers of a note from further payment thereof does not release the others.—Valley Sav. Bank of Middletown v. Mercer, Md., 55 Atl. Rep. 485.

140. RELIGIOUS SOCIETIES — Liability for Damages. — An incorporated religious society held not liable for damages for expulsion of a member by the congregation. — Reinke v. German Evangelical Lutheran Trinity Church, S. Dak., 96 N. W. Rep. 90.

141. RELIGIOUS SOCIETIES — Rights of Members. — A member of a parent church held estopped to contest the right of members of certain chapels maintained by the church to vote on questions concerning current disbursements.—Davie v. Heal, 83 N. Y. Supp. 728.

142. SALES—Receipt Construed.—The word "receipts," as used in the indorsement on a contract for the purchase of machinery for a creamery, construed.—Creamery Package Mfg. Co. v. Benton County Creamery Co., Iowa, 95 N. W. Rep. 188.

143. SCHOOLS AND SCHOOL DISTRICTS — Right to Attend School. — Where a child is wrongfully denied admission to a public school, an injunction may issue to restrain the directors from interfering with her attendance.—Mizner v. School Dist. No. 11 of Sherman County, Neb., 96 N. W. Rep. 128.

144. SHIPPING—Joint Liability for Negligence.—Where an ocean carrier undertook to tranship goods, and employed a lighterage company for the service, they are jointly liable for a loss of the goods through the negligence of the lighterage company.—Smith v. Booth, U. S C. C. of App., Sixth Circuit, 122 Fed. Rep. 626.

145. STREET RAILROADS—Rate of Speed in Fog.—The motorman may be negligent in running a car at a high speed in a fog, though he discovers the peril as soon as possible, and does everything in his power to avert collision.—Fisher v. Union Ry. Co., 83 N. Y. Supp. 694.

146. STREET RAILROADS—Right of Way.—In an action for injuries to the driver of a hose cart in collision with a street car, an instruction as to the custom to give fire apparatus right of way held proper.—Hanlon v. Milwaukee Electric Ry. & Light Co., Wis., 95 N. W. Rep. 100.

147. TRADE MARKS AND TRADE NAMES—Infringement.—The registration of a trade-mark confers no right or title thereto on the registrant, and is at best only *prima facie* evidence of his right, which is not sufficient to warrant a court in granting a preliminary injunction against its infringement.—A. Leschen & Sons Rope Co. v. Broderick & Basscom Rope Co., U. S. C. C., E. D. Mo., 123 Fed. Rep. 149.

148. TRIAL—Order of Evidence.—Permitting the introduction of evidence out of its proper order held to have been within the discretion of the court.—Walton v. Wild Goose Mining & Trading Co., U. S. C. C. of App. Ninth Circuit, 123 Fed. Rep. 209.

149. TRIAL—Separation of Jurors.—In the absence of injury, a mere separation of the jury in civil cases without the consent of the court is not *per se* sufficient ground for a new trial.—Walton v. Wild Goose Mining & Trading Co., U. S. C. C. of App., Ninth Circuit, 123 Fed. Rep 209.

150. TROVER AND CONVERSION—Privity of Ownership—In an action for conversion, the fact that there was no privity of ownership between the person from whom defendant obtained the property and defendant held not to defeat plaintiff's right of action.—Rosenkranz v. Saberski, 83 N. Y. Supp. 257.

151. TROVER AND CONVERSION—Right to Maintain.—One having the legal title and the right to possession of personalty may sue for conversion by a stranger without joining equitable beneficiary.—Chamberlain v. Woolsey, Neb., 95 N. W. Rep. 38.

152. TRUSTS — Assignment of Legacy. — A trustee, to whom an interest in a legacy is assigned to secure the payment of certain judgments against the legatee, may maintain a suit to set aside conflicting assignments and to establish the priority of his own, without joining his *cestui que* trust.—Tompkins v. Tompkins, U. S. C. C., S. D. N. Y., 123 Fed. Rep. 207.

153. TRUSTS—Statute of Frauds.—A purchase of land by an agent for himself held to create a trust for the principal, enforcement of which is not prevented by the statute of frauds.—Brookings Land & Trust Co. v. Bertness, S. Dak., 96 N. W. Rep. 97.

154. VENDOR AND PURCHASER—Change of Possession—Where land in possession of a tenant is conveyed, his continued possession as tenant of the grantee is not constructive notice of the unrecorded deed.—Stockton v. National Bank of Jacksonville, Fla., 34 So. Rep. 897.

155. VENUE—Joinder of Causes.—Where there are distinct causes of action of such a nature that they may be joined in the same suit, venue as to one of them will confer venue as to the other.—First Nat. Bank v. Valenta, Tex., 75 S. W. Rep. 1087.

156. WATERS AND WATER COURSES—Duration of Franchise.—A city ordinance granting to a water company the privilege of using the public streets, without fixing any term, gives a license only, revocable at the will of the city.—Boise City Artesian Hot & Cold Water Co. v. Boise City, U. S. C. C. of App., Ninth Circuit, 123 Fed. Rep. 232.

157. WATERS AND WATER COURSES — Flooding Land.—In an action for unlawfully flooding land, the measure of plaintiff's damage held to be the difference between the value of the land before and after the flooding.—Post v. Merritt, 83 N. Y. Supp. 611.

158. WHARVES — Unsafe Condition of Bottom. — The owner of a wharf is liable for injury to a vessel through his failure to keep the bottom in such condition that vessels can lie safely, or to take special care of a vessel brought there at his instance without a master.—Lewis v. Barber Asphalt Paving Co., U. S. C. C., S. D. N. Y., 123 Fed. Rep. 161.

159. WILLS—Damages to Real Estate. — Money paid by an elevated railroad company for damages to real estate to the executors of the deceased owner is the proceeds of real estate, and not income.—*In re* Levy, 83 N. Y. Supp. 647.

160. WILLS—Death of Landlord. — Where life tenant dies after March 1, rent contracts made before that date go to the personal representatives of the life tenant.—Newton v. Odom, S. Car., 45 S. E. Rep. 105.

161. WITNESSES—Physicians.—A physician may testify as to the condition and state of health of his patient, as well as the treatment prescribed. — Metropolitan Life Ins. Co. v. Howle, Ohio, 68 N. E. Rep. 4.